Supreme Court, U. S.
FILED
MAR 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-1481

GOOD GOVERNMENT GROUP OF SEAL BEACH, INC., *et al.*,

Petitioners,

vs.

THOMAS R. HOGARD,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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vs.

THOMAS R. HOGARD,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

This is a libel action by an elected official, arising out of a local political campaign in 1971. Petitioners respectfully pray that a writ of certiorari issue to review the decision and opinion of the Supreme Court of the State of California filed on November 27, 1978.[1] A copy of the allegedly libelous article may be found in Appendix A at page A-18.

[1]Petitioners are the Good Government Group of Seal Beach, Inc., Good Government Council of Leisure World, College Park Homeowners' Association of Seal Beach, Thomas E. Blackman, Samuel James Clark, Susan Hammond, Bernard B. Jeffreys, Thomas I. McGuire, Thomas I. McKnew, Charlotte Shuman, William Sosnove, Richard C. Smith, Martin Torem, Jerdys Weir, Herbert Coughran, Albert Del Guercio, Frank B. Sales, and Joanne Sales.

Opinion Below.

The majority opinion of the California Supreme Court and the dissenting opinions of Chief Justice Bird and Justice Newman are attached hereto as Appendix A, and are reported at 22 Cal.3d 672, 586 P.2d 572, 152 Cal.Rptr. 258 (1978). The order of the California Supreme Court denying a petition for rehearing is attached hereto as Appendix B.

Jurisdiction.

The judgment of the California Supreme Court was entered on November 27, 1978. A timely petition for rehearing was denied on December 27, 1978 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Questions Presented.

1. Whether, in a libel action to which the *New York Times* privilege applies, a defendant's motion for summary judgment may constitutionally be denied where the sole basis for the plaintiff's case is the use of the hyperbolic phrase "extorted by blackmail" in a political handbill criticizing the arbitrary actions of a City Council in exacting a payment of money to the City.

2. Whether, in a libel action to which the *New York Times* privilege applies, it is the constitutional duty of the trial court, on a motion for summary judgment, to determine, as a matter of law, whether the words complained of were expressions of opinion or statements of fact.

3. Whether the remedy of summary judgment may properly be denied to defendants in a political libel case where there is no clear and convincing evidence of actual malice in the choice of words used.

Constitutional Provisions Involved.

First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment to the United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

On August 24, 1971, by a margin of two to one, respondent Thomas R. Hogard ("Hogard") was recalled by the voters of the City of Seal Beach, California from his office as a Seal Beach City Councilman. During the long and acrimonious political campaign and legal wrangling which preceded Hogard's recall

(and that of his two fellow councilmen, Conway J. Fuhrman and Morton A. Baum) a political article appeared in a homeowners' association newsletter and was circulated in the City. The article was sharply critical of the incumbents and advocated their removal from office. The article was written by a vice-president of petitioner the Good Government Group of Seal Beach, Inc. ("Good Government Group"), a homeowners' association active in local politics and committed to cleaning up the city government of Seal Beach. On February 1, 1972, Hogard, as plaintiff, filed a complaint for libel against the Good Government Group and some 33 other defendants in the Los Angeles County Superior Court. Fuhrman, who was also recalled by the voters, hired the same lawyer and filed a virtually identical action against the same defendants on March 17, 1971. On December 31, 1976, the Los Angeles County Superior Court denied defendants' motion for summary judgment. (Meanwhile, another judge of the same court *granted* defendants' motion for summary judgment in the *Fuhrman* case based on the same article; that case is now on appeal in the California Court of Appeal.) Defendants then sought and obtained a stay of the trial and a hearing in the California Supreme Court on the question whether a peremptory writ of mandate should issue to the Superior Court, compelling the court to grant the motion for summary judgment. On November 27, 1978, in a divided opinion, the California Supreme Court denied the petition for writ of mandate, thereby upholding the Superior Court's erroneous denial of summary judgment. The undisputed facts before the Superior Court, and before the California Supreme Court on review, were as follows:

In July 1970, Morton Baum and Thomas Hogard assumed their offices as two of the five councilmen for the City of Seal Beach. Less than a month later, Baum and Hogard joined with the incumbent councilman Conway Fuhrman in a secret meeting to fire the City Manager and City Attorney. A citizens' group claimed this violated the City Charter and promptly filed a notice of intention to circulate recall petitions against Fuhrman. (Hogard and Baum had not been in office long enough to be subject to recall at that time).

The City Manager had been investigating charges of misconduct and drug abuse at a teenage dance hall operated by one William Robertson. After the City Manager was fired, this investigation was continued by the interim City Manager, who found the charges to be true and suspended the dance hall's license. Robertson, represented by the same attorney who later would represent the recalled councilmen, appealed to the City Council, and a series of tumultuous, sensational public hearings were held over a two month period. Baum refused to disqualify himself despite his close personal relationship with Robertson. In a final three-two vote, Baum, Hogard, and Fuhrman united to reject the City Manager's findings and to reinstate Robertson's dance hall license, further inflaming the public controversy.

Another controversy began on October 21, 1970, when the City of Seal Beach issued building permits for the construction of an apartment complex by R & B Development Company. The property had been acquired, permits had been obtained, and construction was getting underway when suddenly, on November 2, 1970, the same three member majority of the City

Council (Hogard, Fuhrman and Baum) arbitrarily and without notice cancelled and revoked R & B's building permits. The stated reason for this action was to allow a comprehensive study of the environmental impact of the apartment project upon the City. An emergency moratorium ordinance was concurrently adopted by the three-member majority of the council and was applied retroactively to R & B. The R & B Development Company immediately filed suit against the City seeking reissuance of the building permits, an injunction against the enforcement of the moratorium, and for damages.

Just three weeks later, at an executive session (a private or closed session not open to the public), the council reversed itself and exempted the R & B Development Company from the moratorium. The building permits were immediately reissued in exchange for the development company's agreement to pay $100,000.00 to the City, to drop its lawsuit, and to rent to married as well as single persons. The development company had made no changes in its building plans and no environmental studies were conducted. No city ordinance authorized any levy or assessment of this sort. Councilman Holden, joined by Councilman Gummere, the two-member minority on the council, charged that the City's activities amounted to "extortion" and "blackmail." At a public meeting following the executive session, Baum announced the terms of the settlement and Holden stated, "I don't like the idea of using a hatchet on people after you have made an agreement but I'll vote for the matter in order to get the work started and stop the harassment." In approving the deal, the council admitted that there had been no legal grounds for revocation of the permits in the

first place. In short, R & B was the victim of an outright gouge by the three-member majority of the City Council.

Incredibly, Hogard later proudly pointed to this abuse of municipal power as one of his outstanding accomplishments in office. In January, 1971, as part of an attempt to persuade voters not to sign recall petitions against him, Hogard declared in a statement published in local newspapers that one of his accomplishments was the "brinkmanship" exercised by the council to "persuade" R & B Development Company to include married couples as tenants and to pay $100,000.00 to the City as a condition of going forward with the project. (The quotation marks are Mr. Hogard's.) These and other actions were widely reported in local newspapers; hundreds of citizens attended City Council meetings and citizens' organizations such as the Good Government Group were formed to return control of the City to the people.

Shortly after the firing of the City Manager and City Attorney, petitions were circulated to recall Fuhrman and were certified by the City Clerk as being signed by far more than the number of voters required. Nevertheless, Baum and Hogard arrogantly refused to set a date for the Fuhrman recall election. Baum, Hogard and Fuhrman also voted to retain at public expense the same attorney who had represented Robertson in the dance hall hearing, and directed him to "investigate" the recall movement. The City Treasurer questioned the legality of this act and refused to pay the attorney's fees out of the public treasury. Baum, Hogard, and Fuhrman instituted a civil suit to compel payment of the legal fees, but the Superior Court upheld the Treasurer's action. The council ma-

jority also sought to bring criminal charges against the City Treasurer before the Grand Jury, and saw to it that recall petitions were filed against the City Clerk. All of these outrageous actions were widely and sensationally reported in the press and further inflamed the extremely heated political atmosphere in the City.

A mandate proceeding was filed by the Good Government Group in Superior Court to order the council to set a date for the Fuhrman recall election, as required by law. In December, 1970, after a trial, the court issued the writ of mandate and ordered the council to set the election, but Baum, Hogard, and Fuhrman filed an appeal. The appeal was dropped in exchange for the resignation of Councilman Gummere (who had consistently opposed Baum, Hogard, and Fuhrman), and the Fuhrman recall election was set. In January, 1971, notices of intent to circulate recall petitions were filed against Hogard and Baum as well. Fuhrman was recalled by a six-to-one margin in March, and Hogard was recalled by two-thirds of his electorate in August, 1971.

These events were reported in the *College Park Homeowners'* News, a monthly newsletter published by an association of Seal Beach homeowners. In front page articles during November and December, the newsletter detailed the "arbitrary actions," "irresponsible" conduct and "machinations" of the "combine" (Baum, Hogard, and Furhman). A third page article appearing in the February, 1971 issue formed the basis of this libel action by Hogard and the identical action by Fuhrman; both cases were filed by the attorney who had represented Robertson before the Seal Beach City Council.

The article (Appendix A at p. A-18) discussed the conduct of Hogard, Baum, and Fuhrman, denominated the "combine," in their capacity as public officials. They were criticized strongly for expending public funds to fight the Fuhrman recall effort, refusing to set a date for the recall election, and forcing another councilman to resign in exchange for setting a date for the recall election. The article deemed the "combine's" performance of their official duties "recalcitrant" and "irresponsible." Their conduct was denigrated as "daily chicancery and machinations," their actions were considered "infamy." The article concluded that "the combine will pay for its infamy and lose its stranglehold on the City" through recall elections. Readers were warned to expect to hear "a lot of political hog-wash" from the "combine" in defense of their conduct as the recall elections approached.

The paragraph containing the words upon which Mr. Hogard bases his case is buried in the middle of the article. The subject of that paragraph was the settlement of the dispute between the City Council majority and R & B Development Company. In hyperbolic language typical of the rest of the article, the paragraph stated:

> "This is the same combine which extorted by blackmail $100,000.00 from the R & B Development Company. For its thirty pieces of silver the combine agreed to forego its concern for the City's ecology, pollution and strain on our sanitation system that Baum had so sanctimoniously raised during his campaign and in City Council meetings. For economical reasons the R & B Development Company submitted to the 'holdup' and agreed to drop its multimillion dollar suit against the City

so that it could begin the construction of apartment buildings in the downtown section of the City."

The factual basis for this hard-hitting characterization, as well as the rest of the article, is a matter of public record. The basis is manifest from the affidavits of City officials and the raft of newspaper articles which were before the court, describing the heated public debates and showing, without contradiction, the political controversy amidst which the article was published. Nevertheless, the trial court denied defendants' motion for summary judgment and the California Supreme Court refused to intervene, ordering instead that the matter be decided in a jury trial which is estimated to run for four to six weeks. It is that denial of summary judgment that brings the petitioners to this Court.

REASONS FOR GRANTING THE WRIT.

I.

A Political Libel Action Based Solely on the Use of the Hyperbolic Phrase "Extorted by Blackmail" in a Campaign Handbill Cannot Survive a Motion for Summary Judgment.

This Court has never before ruled on the appropriate application of summary judgment procedures[2] to libel cases arising under the *New York Times* privilege, a question presented squarely by this case. In *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) this Court reasoned that the fear of large civil damage awards may be markedly more inhibiting to the exercise of free speech than the fear of prosecution under a criminal libel statute, and held that a public official plaintiff may not recover damages for libel without proving "actual malice" on the part of the defendant. 376 U.S. 254, 279-80. In *this* case, fifteen years later, petitioners submit that the tremendous expense of defending protracted civil libel litigation is every bit as inhibiting as the threat of an actual damage award itself, and that therefore, an application or extension of the *New York Times* rule to summary judgment motions is necessary in order to assure the protection of First Amendment rights.

Several federal courts have adopted a special rule for summary judgment in *New York Times* cases, and have declared that it is a "favored remedy" in libel cases brought by public officials. These courts

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[2]The California summary judgment procedure is substantially the same as that followed in the federal courts. *Compare* Cal. Code Civ. Proc. §437c (West 1979 Supp.) *with* F. R. Civ. P. 56.

have held that in order to survive a motion for summary judgment, a public figure plaintiff must show not only that there is some triable issue of fact (as in an ordinary civil case) but also that he has some clear and convincing evidence of actual malice which would warrant submission of the case to a jury.[3] The cases have reasoned that the liberal use of the summary judgment remedy is the best means of guarding against the chilling effect of protracted libel litigation where the plaintiff plainly cannot meet the *New York Times* standard.

However, this Court has never ruled on the question, and as exemplified by the opinion of the California Supreme Court, the reluctance of state courts to apply the rule and to dispose of meritless cases results in a trampling of First Amendment rights. Furthermore, petitioners note that there is a split of authority among the federal circuits on the question, some courts apparently repudiating the more liberal rule of summary judgment, *e.g., Guam Federation of Teachers, AFL-CIO v. Ysrael,* 492 F.2d 438, 440-41 (9th Cir. 1974), *cert. denied,* 419 U.S. 872 (1974), while other courts embrace it as a means of avoiding the chilling effect of protracted libel litigation on the exercise of First Amendment rights, *e.g., Fadell v. Minneapolis Star & Tribune Co.,* 425 F.Supp. 1075, 1085 (N.D. Ind. 1976), *aff'd,* 557 F.2d 107 (7th Cir.), *cert. denied,*

[3]*E.g., Bon Air Hotel, Inc. v. Time, Inc.,* 426 F.2d 858, 863-65 (5th Cir. 1970); *Oliver v. Village Voice, Inc.,* 417 F.Supp. 235, 237 (S.D.N.Y. 1976); *Guitar v. Westinghouse Electric Corp.,* 396 F.Supp. 1042, 1053-54 (S.D.N.Y. 1976) *aff'd,* 538 F.2d 309 (2d Cir. 1976); *Martin Marietta Corp. v. Evening Star Newspaper Co.,* 417 F.Supp. 947, 954 (D.D.C. 1976); *Fadell v. Minneapolis Star & Tribune Co.,* 425 F.Supp. 1075, 1085-88 (N.D. Ind. 1976), *aff'd,* 557 F.2d 107 (7th Cir.), *cert. denied,* 434 U.S. 966 (1977).

434 U.S. 966 (1977). The present case offers the opportunity both to resolve the conflict and to make an authoritative statement on the proper and expeditious management of libel cases which are affected with important First Amendment policy considerations.

A review of the substantive questions presented by this case must begin with the article itself, which appears in Appendix A at page A-18. Only by reading the entire article can the Court understand the fiery rhetoric and hyperbolic expressions used by the author in this political campaign handbill.

The respondent bases his entire case on the one paragraph in the article which screeches that "[t]his is the same combine which extorted by blackmail $100,000 from the R & B Development Co. . . ."; the remainder of the charges attacked by the plaintiff as libelous were dismissed by the California Supreme Court as mere harmless statements of opinion, which are not actionable (Opinion, Appendix A, page A-8).

The phrase "extorted by blackmail", when read in the context of the entire article, is nothing more than political hyperbole, the type of shrill and caustic criticism, filled with vigorous epithets, which has marked political campaigns in this nation since its birth.[4] The phrase did not appear in a bloodless legal brief or in some carefully reasoned scholarly article. It appeared in a hard-hitting political article in a homeowners' association publication circulated in the course of a rough-and-tumble campaign to "throw the rascals out."

[4]*See e.g.,* Noel, Defamation of Public Officers and Candidates, 49 *Colum. L. Rev.* 875 (1949); Chase, Criticism of Public Officers and Candidates for Office, 23 *Am. L. Rev.* 346 (1889).

As Chief Justice Bird notes in her dissenting opinion, the article "clears its ground with the subtlety of a bulldozer" and is nothing more than a strident expression of the author's opinion (Opinion, Appendix A, page A-28).

In *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), this Court held that the use of the term "blackmail" in a newspaper article describing the heavy-handed negotiating tactics of a local land developer was not libelous, "as a matter of constitutional law." 398 U.S. 6, 13. The Court stated:

> "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized."

398 U.S. 6, 14.

Similarly, in the present case the words "extorted by blackmail" can become ominous only if the article is dissected and the words surgically extracted from the context in which they appeared, and examined without reference to the raging political controversy. The same paragraph uses the word "holdup" in quotation marks, to describe the exaction of the cash payment from R & B, yet in context it is equally plain that the councilmen were not accused of operating with masks and a gun. As Chief Justice Bird stated in her dissenting opinion, "even scant attention to the language of the offending paragraph, set in the midst of this tirade, makes abundantly clear the rhetorical nature of the blackmail charge." (Opinion, Appendix A, page A-28).

The California Supreme Court majority distinguished *Greenbelt* on the ground that the article did not fully and completely describe the background against which the remarks were made (Opinion, Appendix A, page A-10). Yet the uncontradicted record presented to the Superior Court amply disclosed the sensational nature of the R & B affair, which was widely reported in the local press. As in *Greenbelt*, the terms "extortion" and "blackmail" were not conjured up by the author; they were the very words Councilman Holden used in a council meeting, and were merely repeated by the author as part of his broadside. As Justice Newman noted in his dissenting opinion, it is inconceivable that the article could have been adjudged libelous if it had merely attributed the offending words to Councilman Holden (Opinion, Appendix A, page A-17). Yet the California Supreme Court appears to base its pinched-shoe interpretation of the First Amendment on precisely that omission. It is said so often as to be a truism that an allegedly libelous article is to be judged and interpreted in light of the *entire* article, taking into account the context, tone, and apparent object of the writer, as well as extrinsic circumstances such as knowledge of the readers.[5] Yet the California Supreme Court has focused narrowly on the allegedly offending words in one paragraph, ignoring the shrill tone of the remainder of the article and the acrimonious

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[5] *Restatement (Second) of Torts*, §563, Comments (d) and (e). *See e.g., Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 502 (3d Cir.), *cert. denied*, ... U.S. ....., 58 L.Ed.2d 170, 99 S.Ct. 181 (1978); *Pierce v. Northwestern Mutual Life Insurance Co.*, 444 F.Supp. 1098, 1101 (D.S.C. 1978); *Hoffman v. Washington Post Co.*, 433 F.Supp. 600, 602 (D.D.C. 1977), *aff'd*, 578 F.2d 442 (D.C. Cir. 1978).

political circumstances under which it was both written and read.

Furthermore, this case presents an even stronger case for the Court's intervention than *Greenbelt* because of the duty of care involved. In *Greenbelt,* the defendants were professional newspaper reporters, editors, and publishers who were charged with using loose, ambiguous language. Mr. Justice White, concurring in the result in *Greenbelt,* criticized the majority for immunizing *professional* communicators from liability for their use of ambiguous language, and stated:

> "I see no reason why the members of a skilled calling should not be held to the standard of their craft and assume the risk of being misunderstood—if they are—by the ordinary reader of their publications."

Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6, 23 (1970). (White, J., concurring.)

In the present case, the defendants are *not* professional wordsmiths or writers, but instead are average, middle-class citizens who became active in local politics. The crude, typewritten character of the newsletter is itself evidence of the hyperbolic tone of the article, as noted by Justice Newman in his dissenting opinion (Opinion, Appendix A, page A-16). To deny summary judgment, as the California Supreme Court did, because of judicial nervousness over the author's diction, is a devastating blow to freedom of speech, as enjoyed and practiced by the ordinary citizen.

Petitioners need cite only a few of the many dramatic cases in which libel cases have been dismissed or otherwise disposed of because the language was found to be mere hyperbole rather than potentially actionable

statements of fact.[6] The denial of summary judgment in this case and for the reasons set forth in the majority opinion constitutes a departure from the philosophy of *New York Times Co. v. Sullivan,* and will effectively foreclose that remedy in most libel cases in California.

II.

A Trial Court Must Determine, on a Motion for Summary Judgment, Whether an Alleged Libel Is a Constitutionally Protected Expression of Opinion.

The opinion of the California Supreme Court gives lip service to the rule, now followed in some federal courts,[7] that summary judgment is a favored remedy in libel cases arising under the *New York Times* rule, and that in order to survive a motion for summary judgment, a plaintiff must not only show the existence of some triable issue of fact, but must also demonstrate that he has clear and convincing evidence of actual malice sufficient to warrant submission of the case to a jury (Opinion, Appendix A, page A-13). Having made this gesture, the opinion then nullifies its effect and declares that if the words used are "ambiguous," the question must go to the jury to determine whether the words constituted a statement of fact or an expression of opinion, and the motion for summary judgment must be denied (Opinion, Appendix A, page A-9).

It is elementary that the first requirement for a libel action is a false statement of fact; there is no

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[6] *Letter Carriers v. Austin,* 418 U.S. 264, 284 (1974) ("traitor" as applied to scabs during labor dispute); *Cafeteria Employees Local 302 v. Angelos,* 320 U.S. 293, 295 (1943) ("fascist"); *Buckley v. Littell,* 539 F.2d 882, 893 (2d Cir. 1976) ("fascist," "fellow traveler"); *Fram v. Yellow Cab Co. of Pittsburgh,* 380 F.Supp. 1314, 1337-38 (W.D. Pa. 1974) ("paranoid," "schizophrenic"); *Thuma v. Hearst,* 340 F.Supp. 867, 871-72 (D. Md. 1972) ("cold-blooded murder").

[7] See cases cited at footnote 3, *supra.*

such thing as a false idea, and thus a statement of opinion cannot be actionable. *Letter Carriers v. Austin,* 418 U.S. 264, 283-84 (1974); *Gertz v. Welch,* 418 U.S. 323, 339-40 (1974). Obviously, then, the determination of whether an allegedly libelous publication constitutes fact or opinion is a threshold issue which must be determined at the outset of a case. Otherwise, a well-financed public figure plaintiff could sue his critics for legitimate statements of opinion—knowing that at the least he could drag his critics through years of expensive litigation over a meritless case. Thus, although summary judgment is a "favored remedy" in political libel cases the California Supreme Court has actually rendered that remedy unavailable by deferring the crucial fact-opinion determination until the time of trial.

In a unanimous opinion handed down barely two years before the case at bar, the California Supreme Court specifically recognized the threshold nature of the fact-opinion distinction in a libel case. In *Gregory v. McDonnell-Douglas Corp.*, 17 Cal.3d 596, 552 P.2d 425, 131 Cal.Rptr. 641 (1976), the trial court sustained a demurrer without leave to amend in a libel case arising out of a labor dispute, holding that the allegedly libelous publication constituted a mere statement of opinion by management regarding certain union officials and was therefore not actionable. The California Supreme Court affirmed the judgment, and stated:

> "The critical determination of whether the allegedly defamatory statement constitutes fact or opinion is a question of law. (Citations omitted) The distinction frequently is a difficult one, and what constitutes a statement of fact in one context

> may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. Thus, where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion."

Gregory v. McDonnell Douglas Corp., 17 Cal.3d 596, 601, 552 P.2d 425, 131 Cal.Rptr. 641 (1976).

The California Supreme Court purported to distinguish *Gregory* from the case at bar on the ground that in the present case, the language used was ambiguous. The *Gregory* opinion remains the rule only "if the statement unambiguously constitutes either fact or opinion." (Opinion, Appendix A, page A-9).

In the first place, *Gregory* clearly contemplated libel cases involving ambiguous words, and even stated that the fact-opinion distinction "frequently is a difficult one." The *Good Government Group* decision nullifies *Gregory,* and unconstitutionally delays this crucial, threshold determination until the time of trial.

In the second place, the *Good Government Group* decision does not explain why or how the words used in this case are ambiguous, while the words in *Gregory* were unambiguous. The plain effect of this case on trial courts in California and elsewhere will be to defer the fact-opinion distinction to the jury in the great majority of cases on grounds of ambiguity, out of an abundance of caution.

Finally, the fundamental premise of the *Good Government Group* decision is fallacious, for *all* words are ambiguous, and change their meanings as they pass from context to context. Professor I. A. Richards, in his 1936 Bryn Mawr lectures, called ambiguity "the inevitable consequence of the powers of language" and said we can "expect ambiguity to the widest extent and of the subtlest kinds nearly everywhere . . ." I. A. Richards, *The Philosophy of Rhetoric* 40 (Oxford 1965). It is false and misleading to say, as does the California Supreme Court, that some statements are unambiguously statements of fact while others are unambiguously statements of opinion; what the court is *really* saying is merely that in some cases the distinction is easier to make than in others.

The *Gregory* rule sets out a sound principle and practical procedure for courts to follow in disposing of libel actions before trial. Because of the importance of preserving robust, wide-open, and uninhibited debate on public issues, and because of the reluctance of the state courts to dispose summarily of libel cases arising under the *New York Times* privilege, petitioners submit that the *Gregory* rule relating to the fact-opinion determination should be adopted by this Court as a standard to be followed in all such cases. Otherwise, the opinion below will be followed, both by the California courts and by courts in other states which look to California for precedent, and summary judgment will be denied in countless cases where it should properly be granted. The unconstitutional by-product of such a procedure is an unwarranted and expensive delay in resolution of those cases. The cost of defending a multi-party civil libel action in 1979 (including discovery and preparation for a four to six-week jury

trial) is extremely high, and the chilling effect of such expensive litigation (even if successfully concluded) on freedom of speech is at least as great as the threat of a damage award itself. This has been expressly recognized by the federal courts in adopting the more liberal rule of summary judgment in libel cases. *E.g., Fadell v. Minneapolis Star & Tribune Co.*, 425 F.Supp. 1075, 1085 (N.D. Ind. 1976), *aff'd*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977).

Petitioners ask the Court to recognize that the inevitable effect of the rule announced below is to assure that the summary judgment remedy will be foreclosed in a large number of political libel actions. Citizens should be free to express their opinions, even in harsh or ambiguous language; the preservation of that freedom of speech requires a decision by this Court, establishing that the fact-opinion determination is a threshold legal issue which should be determined by the trial court as a matter of law upon a defendant's motion for summary judgment.

III.

Summary Judgment Must Be Granted to Defendants in a Political Libel Case Unless the Plaintiff Shows Clear and Convincing Evidence of Actual Malice.

An additional question presented squarely by this case is whether the plaintiff in a *New York Times* libel case must merely present *some* evidence of actual malice in order to survive a motion for summary judgment, or whether he must instead present *clear and convincing* evidence of actual malice.

The requirement that actual malice be shown with "convincing clarity" originated in this Court's opinion in *New York Times Co. v. Sullivan*, 376 U.S. 254,

285-86 (1964) and has been reaffirmed many times since then. The federal courts, applying this standard to the summary judgment procedure, have held that a public figure plaintiff, in order to survive a defendant's motion for summary judgment, must demonstrate to the court that he has "clear and convincing evidence" showing the actual malice which is constitutionally required by *New York Times*.[8] If a plaintiff cannot produce such evidence and make the required showing at the summary judgment stage, it is unlikely he will be able to produce it at trial, and thus the lawsuit should end, in order to avoid undue infringement on First Amendment rights.

In the case at bar, the California Supreme Court recognized that "actual malice" must be shown at the summary judgment stage, but ignored the requirement that actual malice be shown by evidence of a clear and convincing nature. Instead, the court stated that a jury "could" conclude that some of the defendants were aware of the possible interpretation of the article, and that therefore summary judgment was not warranted. (Opinion, Appendix A, page A-14.) In short, the California Supreme Court, while nodding dutifully in the direction of the First Amendment, applied the traditional rule of summary judgment and held, in effect, that *any* evidence is enough to warrant a jury trial.

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[8]*Buchanan v. Associated Press*, 398 F.Supp. 1196, 1204 (D.D.C. 1975); *Ragano v. Time, Inc.*, 302 F.Supp. 1005, 1010 (M.D.Fla. 1969); *Oliver v. Village Voice, Inc.*, 417 F.Supp. 235, 237 (S.D.N.Y. 1976); *Guitar v. Westinghouse Electric Corp.*, 396 F.Supp. 1042, 1054 (S.D.N.Y. 1976); *Fadell v. Minneapolis Star & Tribune Co.*, 425 F.Supp. 1075, 1086 (N.D.Ind. 1976), *aff'd*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977).

This is not the test, as enunciated by the federal courts, and leaves petitioners facing unnecessarily protracted litigation which itself violates their constitutional rights. A writ of certiorari should issue in order to permit this Court to correct the California Supreme Court's erroneous statement of the rule and to establish the proper constitutional standard for evaluating evidence presented in connection with summary judgment motions in *New York Times* cases. Otherwise, the opinion below will stand and the effectiveness of the *New York Times* rule at the summary judgment stage will be nullified.

IV.

The Decision of the California Supreme Court Is Final for Purposes of 28 U.S.C. §1257(c), Insofar as It Relates to the Remedy of Summary Judgment.

Petitioners submit that this case presents, under almost laboratory conditions, a perfect opportunity for an authoritative application of the summary judgment procedure to political libel cases arising under the *New York Times* privilege. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The decision of the California Supreme Court is final, for purposes of 28 U.S.C. §1257(c), insofar as it relates to the denial of summary judgment. As in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), a decision by this Court vindicating petitioners' right to summary judgment *after* a trial and final judgment in the state court would be meaningless. On the other hand, decision of the important First Amendment issues now will end the litigation, and clarify the rules relating to summary judgment in libel cases arising out of political campaigns.

There will be no further state court rulings on the appropriateness of summary judgment in this case; that remedy, designed to avoid the chilling effect of protracted civil libel litigation, has now been finally foreclosed by the California Supreme Court. As in *Cox*, the judgment of the California Supreme Court is "plainly final on the federal issue" presented here (*viz.*, the appropriate application of the summary judgment remedy to vindicate federal constitutional rights in a political libel case) "and is not subject to further review in the state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975). As in *Cox*, the petitioners here may prevail at trial on other grounds, but if the remedy of summary judgment was improperly denied, there should be no trial at all. Furthermore, even if petitioners prevail after a long and expensive trial in state court, the disabling decision of the California Supreme Court would remain in effect, with unhappy results for courts and litigants alike.

This case parallels *Cox*, in that:

> "Delaying final decision of the First Amendment claim until after trial will 'leave unanswered . . . an important question of freedom of the press under the First Amendment,' 'an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press.' (Citation omitted) On the other hand, if we now hold that the First and Fourteenth Amendments bar civil liability for broadcasting the victim's name, this litigation ends. Given these factors—that the litigation could be terminated by our decision on the merits and that a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal

> sanctions of a rule of law and a statute the constitutionality of which is now in serious doubt—we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality."

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 485-86 (1975) (footnote omitted).

The present case presents a judicial construction, rather than a state statute as in *Cox*, but the impracticality of deferring review of the federal constitutional issue, and the chilling effect on freedom of speech of leaving the decision unreviewed are the same. The finality requirement is satisfied in those cases where the federal issue has been decided, arguably wrongly, and where it would be determinative of the litigation if decided the other way. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 n.13 (1975).[9] Furthermore, the present case seems well within the parameters of finality defined by the Court in decisions which have followed *Cox*. In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court accorded finality to a state court order denying a motion to quash service of process and to vacate an order of sequestration on constitutional grounds. The alternative, as in *Cox*, would have been to subject the defendants to a trial which, if the constitutional issues had been decided erroneously, should not have occurred at all. 433 U.S. 186, 195 n.12. Similarly, in this case, the failure to accord finality to the decision

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[9] *See Construction Laborers Local 438 v. Curry*, 371 U.S. 542, 549 (1963); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963); *North Dakota State Board of Pharmacy v. Snyder's Drugstores*, 414 U.S. 156, 162-63 (1973); *California v. Stewart*, 384 U.S. 436, 498 n.71 (1966); and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 246-47 & n.6 (1974).

of the California Supreme Court will require petitioners to defend themselves in a long and expensive jury trial which should not occur at all if the summary judgment on federal constitutional grounds was improperly denied.[10]

The propriety of summary judgment in a political libel case is a separate, severable issue from the merits of the case and is affected by important considerations of constitutional policy which are vitiated if the motion is erroneously denied. Because subjecting the petitioners to the subsequent state court proceedings would in itself deny the First Amendment rights they are seeking to vindicate, and because it is unlikely that the summary judgment question will ever be presented to this Court except in a procedural posture similar to the present case, the finality requirement should be deemed satisfied, and the writ granted.

Conclusion.

New York Times Co. v. Sullivan expressed the concern of this Court that the mere threat of potentially unlimited damage awards would inevitably have a chilling effect on free speech contrary to the strong policy of this nation that debate on public issues should be robust and uninhibited. When to that threat is added

[10] *See also New York v. Cathedral Academy,* 434 U.S. 125, 128 n.4 (1977) ("further proceedings cannot remove or otherwise affect this threshold issue . . ."); *National Socialist Party v. Village of Skokie,* 432 U.S. 43, 44 (1977) (state supreme court order denying a stay held final "since it involved a right 'separable from, and collateral to' the merits . . .").

the reality of crippling legal costs in defending unnecessarily protracted litigation, the chilling effect is even more pervasive.

The *New York Times* principles must now be implemented. In addition to disposing of cases where the plaintiff cannot show clear and convincing evidence of "actual malice," summary judgment must now be sanctioned as the instrument for protection of First Amendment rights to be used by the lower courts in determining as a matter of law, *prior to trial,* whether words used in a political debate were an expression of opinion of the speaker or constituted a defamatory statement of fact. Where the record shows beyond dispute that the speech under attack was uttered in the course of vigorous and heated debate of public issues in a political controversy, the trial court must not be permitted to shirk its responsibility for the protection of free speech on the ground that the words were ambiguous and that the court is uncertain as to whether they expressed opinion or fact. Such a judicial emasculation of the right of uninhibited debate is a retreat from the principles of *New York Times* and unacceptable to our national purpose.

To declare these principles, halt the erosion of First Amendment rights that is destined to follow the California Supreme Court's decision and to eliminate a conflict in the federal circuits, a definitive statement by this Court is now essential. Without it, in the closing words of California's Chief Justice Bird, "good government is made a double victim."

Petitioners respectfully request that a writ of certiorari issue to review the decision and opinion of the California Supreme Court, or in the alternative, that the decision and opinion of the California Supreme Court be summarily reversed with instructions to grant defendants' motion for summary judgment.

Dated: March 6, 1979.

Respectfully submitted,

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APPENDIX.

Opinion.

Good Government Group of Seal Beach, Inc., et al., Petitioners, v. The Superior Court of Los Angeles County, Respondent; Thomas R. Hogard, Real Party in Interest. [L.A. No. 30839, Nov. 27, 1978.]

COUNSEL

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No appearance for Respondent.

Jacque Boyle for Real Party in Interest.

OPINION

MOSK, J.—The trial court denied defendants' motion for summary judgment in an action for libel, and they seek a writ of mandate to compel the court to grant the motion.

At the time the allegedly libelous publication appeared, Thomas R. Hogard, real party in interest, was a councilman in the City of Seal Beach. The article was written by the vice president of a citizens' organization known as the Good Government Group of Seal Beach, Inc. (Good Government), published in a local homeowners' association newsletter in February 1971, and was also distributed to the general public as a flyer. It stated that Hogard and two other city councilmen, Fuhrman and Baum, referred to as "the combine," had "extorted by blackmail" $100,000 from a development company. Hogard, charging the article was libelous, named the author of the article, the association, Good Government, and various others as defendants in his complaint.

At the time of publication, the municipality was in the throes of political turmoil and strife that was likely to ulcerate the most tranquil dispositions. Hogard served as a councilman from July 1970 until he was recalled in August 1971. In the months preceding publication, the city manager and city attorney had been discharged, recall petitions had been filed against Fuhrman, and notices of intention to circulate recall petitions against Hogard and Baum had been filed. The majority of the council refused to authorize the recall election of Fuhrman, and a mandate proceeding was instituted to compel it to do so. The council engaged an attorney to investigate the recall campaign, but the city treasurer refused to pay the attorney's fees, and the council majority sought to file charges with the grand jury against the treasurer. One member of the council resigned, and a notice of recall was filed against the city clerk.

On October 30, 1970, the city revoked building permits previously issued to R & B Development Co. to construct an apartment project, on the ground that the permits were issued in error, were based upon incorrect information, and violated city ordinances. The city council enacted an ordinace imposing a temporary moratorium on construction in the area of the development pending completion of an environmental study, giving as its reasons that the project had not been properly investigated and no consideration had been given to its effect upon the environment. The developer filed suit against the city. On November 23 in an executive session of the city council held to discuss the lawsuit, Hogard, Fuhrman and Baum proposed that if the developer would agree to dismiss the suit and to pay the city $100,000, it should be permitted

to proceed with its project in accordance with the plans previously filed. At that time Holden, a member of the city council, characterized this proposal as "outright extortion" and "blackmail."

At a public meeting following the executive session, Baum announced the terms of the settlement and Holden stated, "I don't like the idea of using a hatchet on people after you have made an agreement but I'll vote for the matter in order to get the work started and stop the harassment." No changes in the building plans were made and no environmental studies were conducted between the time the permits were revoked and their reinstatement pursuant to the agreement. As part of the settlement, the developer agreed to rent the apartments to married couples as well as single persons.[1]

The article at issue charged Hogard, Fuhrman and Baum with "chicanery and machinations" with respect to their conduct in the recall of Fuhrman, described their conduct as "recalcitrant," and warned that they would pay for their "infamy."

The most damaging references to Hogard were contained in the following paragraph: "This is the same combine which extorted by blackmail $100,000 from the R & B Development Company. For its thirty pieces

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[1]In January 1971, shortly before publication of the article, Hogard, in an attempt to persuade voters not to sign recall petitions against him, declared in a local publication that one of his accomplishments was the "brinkmanship" exercised to "persuade" R & B Development Co. to include married couples as tenants in the apartment complex. In addition, he stated that residents of the city should not be burdened with the additional cost of city services engendered by large apartment projects, and that a "renegotiated agreement" with the developer required it to pay $100,000 as an environmental reserve tax.

of silver the combine agreed to forgo its concern for the City's ecology, pollution and strain on our sanitation system that Baum had so sanctimoniously raised during his campaign and in City Council meetings. For economical reasons the R & B Development Company submitted to the 'holdup' and agreed to drop its multi-million dollar suit against the City so that it could begin the construction of apartment buildings in the downtown section of the City."

Hogard filed suit, charging that the statements in the article were false, that defendants knew they were untrue or acted with reckless disregard of whether or not they were false, that they intended the statements to be understood by the public as charging him with crime, and that the public so understood them. He alleged that as a result of the charges contained in the article, he was unable to find employment, was defeated in the recall election, and suffered nervous shock and strain. The complaint sought general damages in the amount of $500,000, special damages of $31,000, and punitive damages of $500,000.[2] Defendants moved for summary judgment, filing affidavits in support of their motion, setting forth the facts outlined above; Hogard filed counteraffidavits. As we have seen, the motion was denied by the trial court.[3]

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[2]A second cause of action alleged that Hogard had sought a retraction, that defendants had published a retraction which did not include a correction of the use of the word "infamy" in the article, and that the use of that term was libelous. The complaint also contained a third cause of action for conspiracy to libel Hogard.

[3]Defendants assert that their motion should have been granted because both they and Hogard agreed that there were no triable issues of fact. (Citing *Burke Concrete Accessories, Inc. v. Superior Court* (1970) 8 Cal.App.3d 773 [87 Cal. Rptr. 619].) They rely upon the circumstance that Hogard also filed a motion for summary judgment and assert that this motion amounted to an admission by him that there were no issues of fact to be tried. Hogard's motion was denied, but not on the merits. In any event, the trial court was not required to accept the characterization of the parties as to what matters constituted issues of fact or law. As we shall see, the court correctly concluded that summary judgment was inappropriate because there remain issues to be determined by a jury.

In this proceeding, defendants do not assert that Hogard has ever committed extortion or blackmail, nor do they deny that the statements are libelous if they are viewed as charging the commission of such crimes; rather, they contend, the statements referring to extortion and blackmail, when viewed in the context of the article as a whole and the tense political situation which existed in the city at the time the article was published, could not have been viewed by a reader as literally charging Hogard with crime, but amounted merely to sharp criticism of his conduct, using figurative language. Moreover, they contend, even if, by giving the words used in the article a "strained and unintended interpretation" they may be read as literally charging Hogard with the commission of crimes, nevertheless their motion for summary judgment should have been granted because the affidavits offered by Hogard in opposition to the motion failed to show that the statements were made with actual malice, as that term is defined in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412].

We begin our analysis of these contentions with the decision in *New York Times,* which established the principles applicable to an action for libel brought by a public official. There, an elected official in Alabama alleged that he had been libeled by a newspaper

advertisement which contained false statements regarding his official conduct. The Supreme Court reversed a judgment in his favor holding that it violated the First and Fourteenth Amendments to the United States Constitution.

The court reasoned that the advertisement qualified for constitutional protection because it expressed a grievance regarding one of the major issues of the time, that erroneous statements are inevitable in free debate and must be protected if freedom of expression is to have "breathing space," and that neither factual error nor defamatory content removes criticism of the conduct of a public official from the protection of the Constitution. It concluded that a public official may not recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice. That term was defined as knowledge by the defendant that the statement was false or reckless disregard of whether it was false.

In light of this holding, the two major issues which we must decide are whether the statements complained of constituted false statements of fact, and whether a sufficient showing of malice was made to justify the conclusion that the issue must be decided by a jury.

In *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596 [131 Cal.Rptr. 641, 552 P.2d 425], we discussed the difference between a statement of fact and a statement of opinion in an action for libel. There, the defendant corporation issued a bulletin in a labor dispute, stating that union officers were "apparently" willing to sacrifice the interests of the members of the union to further their personal ambitions.

We reasoned that "there is no such thing as a false idea" (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339 [41 L.Ed.2d 789, 805, 94 S.Ct. 2997]), and that an essential element of an action for libel is a false statement of fact. An allegedly defamatory statement may constitute a fact in one context but an opinion in another, depending upon the nature and content of the communication taken as a whole. "Thus, where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." (17 Cal.3d at p. 601.)

Our conclusion was that the charges were neither factual in nature nor calculated to induce the audience to which they were addressed to conclude that they were factual, that they did not impute crimes or dishonesty to plaintiffs, and that they were of a kind typically generated in a spirited dispute in which the loyalties and subjective motives of rivals are attacked and defended.

In our analysis of the character of the article involved here, we note, first, that the words "recalcitrant," "machinations," "infamy," and others of similar import represent statements of opinion as to Hogard's conduct and, as such, they may not be made the basis for a libel action. These terms, as used in the article, may be "epithets, fiery rhetoric or hyperbole" but they are, to paraphrase *Gregory*, of a kind frequently generated in an acrimonious dispute in which the integrity and subjective motives of competitors are under attack.

Since they amount to a characterization of the conduct of Hogard with regard to the matters described in the article, they are merely statements of opinion and not actionable.

But a conclusion is less certain with respect to the statements in the paragraph quoted above. As to those expressions, we cannot accept the position of Hogard that they are clearly factual and charge him with committing extortion or blackmail, nor do we accede to defendants' claim that they constitute opinion as a matter of law.

The article omits any reference to the fact that the $100,000 was paid by the developer *to the city;* thus it could be understood as charging that Hogard and his fellow councilmen personally pocketed the funds. On the other hand, the general tenor of the article, when viewed in the light of the political turmoil which pervaded the city at the time of its publication, and the placement of the offending paragraph in the middle of a lengthy and vehement denunciation of the alleged official misdeeds of "the combine" could be read to suggest that the references to "extortion" and "blackmail" did not charge Hogard with committing those crimes, but were only a caustic and strident characterization of Hogard's public acts with reference to the developer's project. The fact that the city had received the $100,000 payment in settlement of the dispute with the developer was public knowledge. Hogard himself had listed the exaction of the payment as one of his accomplishments in office in a statement circulated to local residents, and the suggestion in the article that the developer agreed to drop his lawsuit against the city is itself some indication that it was

the city rather than "the combine" which benefited from the payment.

In our view the article is ambiguous, and we cannot as a matter of law characterize it as either stating a fact or an opinion. In these circumstances, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion charging Hogard with crime, or whether the statements were generally understood as an opinion respecting his public conduct in regard to the development project.

This conclusion is not contrary to our statement in *Gregory* that the distinction between fact and opinion is a question of law; that remains the rule if the statement unambiguously constitutes either fact or opinion. Where, as here, however, the allegedly libelous remarks could have been understood by the average reader in either sense, the issue must be left to the jury's determination. (Cf. *Mellen v. Times-Mirror Co.* (1914) 167 Cal. 587 [140 P. 277].)

Defendants rely upon *Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6 [26 L.Ed.2d 6, 90 S.Ct. 1537], in which the use of the word "blackmail" was held not libelous as a matter of law. The defendants in that case published a weekly newspaper in which they reported that at a meeting of the city council several persons had characterized the conduct of a developer (concededly a public figure) as constituting "blackmail." As reported in the articles, the developer had proposed that if the city would rezone certain land owned by him to high density, he would agree to the price offered by the city for another tract of land he owned, property which the city wished to acquire for a high school.

The developer claimed that the use of the word "blackmail" was libelous because the defendants knew that he had not committed such a crime. The high court, in reversing the trial court's judgment in favor of the developer, held that, because the newspaper had published a full, fair and accurate account of the debates without distorting the report so as to extract the word "blackmail" from the context in which it was used, and because the developer's proposal was accurately described, it was impossible to believe that a reader who reached the word "blackmail" in the article would not have understood that the criticism was directed at the developer's public and wholly legal negotiating proposals.

"No reader," stated the court, "could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging [the developer] with the commission of a criminal offense. [Fn. omitted.] On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought [the developer] had been charged with a crime." (398 U.S. at p. 14 [26 L.Ed.2d at p. 15].)

Here, unlike *Greenbelt,* the publication did not describe the background against which the remarks concerning the use of the terms "blackmail" and "extortion" were made. There was no mention of the compromise settlement under which R & B Development Co. agreed to pay the $100,000 to the city, nor any specific mention that the sum was paid to the city rather

than to "the combine." Therefore, unlike *Greenbelt,* we cannot say as a matter of law that the terms "blackmail" and "extortion" could not have been and were not understood as charging Hogard with crime.

Although a triable issue of fact is presented as to whether the publication constituted a factual assertion that Hogard had committed extortion or blackmail, the question remains whether Hogard made a sufficient showing of malice to justify denial of defendants' motion for summary judgment. As we have seen, the test of malice under *New York Times* is whether the defendant knew the statement was false or acted with reckless disregard of whether or not it was false.

Hogard's position in this regard is simple: he argues that since defendants concede that they were aware prior to publication that Hogard had never committed extortion or blackmail, they published the defamatory statements with knowledge of falsity, and thus the test for malice set forth in *New York Times* is satisfied.

We disagree with this proposed simplistic formula. It is undisputed that negligence in the publication of a defamation is insufficient to meet the test of malice under *New York Times.* (*Garrison v. Louisiana* (1964) 379 U.S. 64, 78-79 [13 L.Ed.2d 125, 134-136, 85 S.Ct. 209]; *Rosanova v. Playboy Enterprises, Inc.* (S.D. Ga. 1976) 411 F.Supp. 440, 448.) If we were to accept Hogard's contention, it would mean that a defendant who makes a statement which is ambiguous in the sense that it can reasonably be viewed as either fact or opinion, but who neither intends the statement to bear a factual meaning nor believes that it will be understood by the reader in that fashion, will be guilty of libel if a jury later determines that the article was understood in its factual, defamatory sense.

Such a holding would render a defendant liable for a defamatory statement negligently made and would create precisely the chilling effect on speech which the *New York Times* rule was designed to avoid. The Supreme Court made it clear there that the reason for its ruling requiring a showing of malice in libel actions involving the conduct of public officials is that otherwise "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." Such a rule "dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." (376 U.S. at p. 279 [11 L.Ed.2d at p. 706].)

If Hogard was to prevail in his view, the result would be a hobbling of free speech by the continuing fear of liability for the use of inexact semantics. The First Amendment protects not only the expression of a political opinion but the choice of words used to convey that opinion.

It is clear that honest belief of the defendant is the touchstone of the privilege enunciated in *New York Times*, and that a statement is entitled to constitutional protection if the words used are ambiguous but the defendant honestly and without recklessness believes that they constitute an opinion or idea. We hold, therefore, that in order to find the requisite malice from the publication of ambiguous words which could constitute either fact or opinion, the jury must find not only that the words were reasonably understood in their defamatory, factual sense, but also that the defendant either deliberately cast his statements in an

equivocal fashion in the hope of insinuating a defamatory import to the reader, or that he knew or acted in reckless disregard of whether his words would be interpreted by the average reader as defamatory statements of fact.

Our next inquiry is whether there was a sufficient showing in the present case to meet this standard. Defendants are correct in asserting that, because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable. (*Dombrowski v. Pfister* (1965) 380 U.S. 479, 486-487 [14 L.Ed.2d 22, 28-29, 85 S.Ct. 116].) Therefore, summary judgment is a favored remedy, and upon such a motion the trial court must determine whether there is a sufficient showing of malice to warrant submission of that issue to the jury. (See, e.g., *Bon Air Hotel, Inc. v. Time, Inc.* (5th Cir. 1970) 426 F.2d 858, 864-865; *Time, Inc. v. McLaney* (5th Cir. 1969) 406 F.2d 565, 566; *Oliver v. Village Voice, Inc.* (S.D.N.Y. 1976) 417 F.Supp. 235, 237; see *Belli v. Curtis Pub. Co.* (1972) 25 Cal.App.3d 384, 389 [102 Cal.Rptr. 122].)

We believe Hogard has made a sufficient showing of malice to justify consideration of the issue by the jury if it finds that the article was reasonably understood as alleging that Hogard was guilty of crime.

Shortly after the publication of the article, Hogard wrote the association that some of the statements in the article, including the statement relating to extortion and blackmail, were "grossly libelous," and he demanded a retraction. In the March issue of the association publication, a retraction was published, which stated, inter alia, "The use of the words 'extorted'

and 'blackmail' were not intended to state or imply that any of the persons mentioned in the article had committed the crimes of 'blackmail' or 'extortion.'" Following this disclosure, the publication printed the statement by Hogard, referred to above, regarding his exercise of "brinkmanship" and persuasion with reference to the R & B Development Co.'s project.[4] According to Hogard's declaration filed in opposition to the motion for summary judgment, after the retraction was published he observed the author of the original article and other members of Good Government distributing a flyer of the article as originally printed.

In our view, a jury could conclude from this evidence that at least some of the defendants were aware that the words used in the article could be interpreted

[4]The article stated under the heading "Retraction": "In its February 1971 issue of the College Park News, the College Park Homeowners Association printed an article entitled 'How Much Can the Citizens of Seal Beach Stand?'" In this article it was stated, among other things:

"1. 'This is the same combine which extorted by blackmail $100,000 from the R & B Development Company. . . .'

"2. 'He had had (referring to former City Councilman Lloyd Gummere) his fill of the Hogard-Fuhrman-Baum-Robertson daily chicanery and machinations.'

"CPHA, its officers and directors and everyone connected with the publication and circulation of our February 1971 issue, hereby unequivocally retract the quoted excerpts from the above mentioned article. The use of the words 'extorted' and 'blackmail' were not intended to state or imply that any of the persons mentioned in the article had committed the crimes of 'blackmail' or 'extortion.'

"In lieu of the first sentence retracted above, the following statement published by Seal Beach City Councilman Thomas R. Hogard in the January 14, 1971 issue of the Seal Beach-Leisure World 'Penny-saver' is substituted therefor:

"'The prior administration (referring to the former City Council) made some agreements to the R & B Development Company. We nevertheless managed, with some "Brinkmanship" on our part, to "persuade" R & B to abandon. . . .' and '. . . As an example a renegotiated agreement with R & B Development Company requires them to pay $100,000 . . .'"

as defamatory statements of fact instead of "allegorical language . . . voicing a vigorous political opinion, in strident tones," as defendants claim.

Finally, defendants assert that Hogard is not entitled to punitive damages under section 3294 of the Civil Code[5] because that provision is unconstitutional as applied to a libel action in which the *New York Times* privilege applies. (Citing *Maheu v. Hughes Tool Company* (C.D.Cal. 1974) 384 F.Supp. 166; but see *Appleyard v. Transamerican Press, Inc.* (4th Cir. 1976) 539 F.2d 1026.) This issue was not raised by defendants in their motion for summary judgment, and we need not reach it at this preliminary stage of the proceeding.

The peremptory writ of mandate is denied.

Tobriner, J., Clark, J., Richardson, J., and Manuel, J., concurred.

NEWMAN, J.—I dissent. That often there are quarrels among town residents, and that passions of election politics sometimes run high, hardly should shock this court. Almost never, I believe, should judges attempt to monitor those conflicts.

The majority opinion's third paragraph summarizes the 1970-1971 "turmoil and strife" in Seal Beach. The version presented, however, is bowdlerized. For more picturesque accounts the appendix that counsel filed with the Court of Appeal on January 14, 1977, must be examined; e.g., the lengthy declarations of

[5]Section 3294 of the Civil Code provides, "In action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

Thomas McKnew ("two months of sensational hearings involving . . . a Seal Beach dance hall . . . found to be involved in teen-age drug and other abuses") and Charlotte Shuman ("Hundreds of concerned citizens turned out in force to attend council meetings for many weeks"); and see too plaintiff's lengthy flyer "It's Your Decision," with its paragraphs on "HELL, HATE AND HARRANGUE."

The words my colleagues find most offensive are "blackmail" and "extorted." They were used on November 23, 1970, at a city council meeting, by a council member who here declares that "Councilman Gummere joined me in this characterization" and "No one present denied my statement." They then appeared in the second column on an inside page of the February 1971 issue of the *College Park News,* in a two-and-a-half column article entitled "How Much Can the Citizens of Seal Beach Stand?" And during the subsequent weeks that article apparently was photocopied and distributed as a one-page flyer.

For possible future reference I append the article to this opinion (and I am sorry that portraying its truly political and nondefamatory flavor more accurately, by photocopying instead of printing, seems unfeasible here).

The California Constitution declares, "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." (Art. I, § 2.) Was there "abuse" here? I think not, given the turmoil and strife and the long-built-up heat of the local election campaign. I have no precise image of the "ordinary" or "average" reader, but I do not accept the majority's conclusion that a jury should decide "whether an ordinary reader would

have understood the article as a factual assertion charging Hogard with crime." Nor would I assign to a jury the question whether "defendant either deliberately cast his statements in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or . . . knew or acted in reckless disregard of whether his words would be interpreted by the average reader as defamatory statements of fact."

That kind of jurying may be appropriate for non-campaign settings. Those prescriptions should not be used, however, as formulas that permit judges and juries in cases like this to chill the speech of vehemently controversial electioneering.

Finally, the majority accord no significance to the fact that the words claimed to be defamatory seem first to have been used by an elective official at an official meeting. Is it conceivable that the criticized article could be adjudged libelous had it stated, "This is the same combine which, *as Councilman Holden observed at the November 23d meeting,* extorted by blackmail, etc.?"[1]

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[1]The "Answer of Thomas R. Hogard" that the majority opinion describes in its first footnote, which preceded petitioner's allegedly libelous article, seems to have been exactly what its title implies: i.e., plaintiff's answer to protests at the November 23d council meeting and elsewhere. Does he not say, in effect, that he engaged not in what council colleagues loosely described as blackmail and extortion but rather in "brinkmanship" and "persuasion." (The quotation marks are his.) The legitimate inference is that, until the article as a whole began to have an observable impact on votes, he knew very well that he had been charged with neither criminal blackmail nor criminal extortion.

Compare Mayor George Moscone's recent comment at the July 10th meeting of the San Francisco Board of Supervisors, as reported on page 1 of the S. F. Chronicle, July 11, 1978: " 'There's never been a greater *hijack* in the history of the board,' said the mayor." (Italics added.)

APPENDIX TO OPINION OF NEWMAN, J.

HOW MUCH CAN THE CITIZENS OF SEAL BEACH STAND!

by

Albert Del Guercio,
Vice President of Good Government
Group of Seal Beach

The citizens of Seal Beach finally had their day in court and the Robertson-Baum-Fuhrman-Hogard combine was dealt a mortal blow. Superior Court Judge Van Tatenhove, after days of hearings, issued an order requiring the recalcitrant councilmen—Baum, Fuhrman and Hogard to set a date for the recall of Fuhrman. In so doing the Judge found that Jody Weir, the City Clerk, had properly performed the duties of her office in certifying as valid and sufficient the recall signatures of over 50% of Fuhrman's councilmanic district. It overruled Bentson's inadvisable contention that the law required 25% of the signatures of the voters of the entire City.

Notwithstanding the favorable court decision, the combine continued to deny the citizens their rights, and instructed Bledsoe (Robertson's former attorney) to file a notice of appeal. This would have had the effect of stalling the recall for months if not a year. This was too much for Councilman Lloyd Gummere to stomach. Notwithstanding his long record of outstanding public service he had been harassed, maligned and his motives impugned by the combine. He had had his fill of the Hogard-Fuhrman-Baum-Robertson daily chicanery and machinations. So at the January 4th meeting of the City Council it was announced that he had reached an agreement with the combine

whereby he would resign as councilman and the combine would drop the appeal and set a date for the Fuhrman recall election and the election of his successor. The date of the recall election was thereafter set for March 30, 1971.

Thus as a result of the sacrifice of the venerable senior councilman, the people of Seal Beach will be permitted to exercise its sovereignty over its public servants. But it will be difficult to find a man to fill Mr. Gummere's (affectionately known as "Pop") place. The combination had needlessly spent over fourteen thousand dollars of the taxpayers money to fight Fuhrman's battle and to frustrate the will of the people. In addition, the combine by its unjustified action compelled the Good Government Group to raise over twelve thousand dollars in legal fees to fight the people's battle. The money is coming from small donations from thousands of concerned citizens of Seal Beach. This is the price we had to pay in order to oust irresponsible men from office and restore honest and responsible government in the City. The day the combine compelled the resignation of one of its most respected and beloved councilman to insure the people their rights, will go down as a day of infamy.

This is the same combine which extorted by blackmail $100,000 from the R & B Development Company. For its thirty pieces of silver the combine agreed to forgo its concern for the City's ecology, pollution and strain on our sanitation system that Baum had so sanctimoniously raised during his campaign and in City Council meetings. For economical reasons the R & B Development Company submitted to the "holdup" and agreed to drop its multi-million dollar suit against

the City so that it could begin the construction of apartment buildings in the downtown section of the City.

But the combine will pay for its infamy and lose its stranglehold on the City. Notices of intention to recall have been served on Baum and Hogard and circulation of petitions have commenced. For the first time the Fuhrman-Hogard-Baum combine have dropped their arrogance and are running scared. They were given an opportunity in the recall notice to answer specific charges of misconduct and illegal activities. They elected not to do so but instead chose to set up a smoke screen by falsely claiming to have benefited the City of Seal Beach during their incumbency. They enshrined themselves in a cloak of innocence and humility that ill becomes them. From now to the date of the election you will hear a lot of political hogwash from this combine. It appears that Robertson will have to move elsewhere to impose his will on an elective body.

BIRD, C.J., Dissenting.—The First Amendment protects the expression of political opinions—the polite utterance along with the rude remark, the sober judgment along with the emotional exaggeration. However, the majority find that an article criticizing the official conduct of three city councilmen may have gone beyond the expression of opinion to include *one* false statement of fact. This, the majority conclude, warrants denial of defendants' motion for summary judgment.

I cannot agree. When read in context, the offending phrase, which supposedly accuses the councilmen of *criminal* blackmail, emerges clearly as a literary device for ridiculing their *political* conduct. Beyond the instant case, I fear the majority opinion will have a "chilling effect" on the exercise of legitimate First Amendment rights. Every critic of government must now unduly restrain his or her language, lest some imaginary reader mistake literary license for criminal allegations.

I

This country has "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270 [11 L.Ed.2d 686, 701, 84 S.Ct. 710, 95 A.L.R.2d 1412].) The constitutional guarantees of free speech and press assure every person "the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." (*Baumgartner v. United States* (1944) 322 U.S. 665, 674 [88 L.Ed. 1525, 1531, 64 S.Ct. 1240].) It

is, after all, a sign of a free society that politics still engenders passion—and the excesses of passion. Therefore, courts wisely refuse to prescribe rules of etiquette for political parlance. "Rhetorical hyperbole," "vigorous epithet[s]" and opinions couched "even in the most pejorative terms" are all in order. (*Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6, 14 [26 L.Ed.2d 6, 15, 90 S.Ct. 1537]; *Letter Carriers v. Austin* (1974) 418 U.S. 264, 284 [41 L.Ed.2d 745, 761-762, 94 S.Ct. 2770].) For we must recognize that *how* one talks about a political candidate is often *what* one wants to say. Therefore, to restrict the language of political dialogue is ultimately to restrict the dialogue itself. The First Amendment was promulgated in recognition of this fact.

Unlike an expression of opinion, a false statement of fact may be the basis of a defamation action. Unfortunately, few words are immutably cast as either statements of fact or opinion.[1] "[W]hat constitutes a statement of fact in one context may be treated as a statement of opinion in another . . . ." (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 601 [131 Cal.Rptr. 641, 552 P.2d 425].) Therefore, a court looks to see whether a particular expression is one of fact or opinion. In making this determination, courts look to the nature and content of the communication and to the knowledge and understanding of the individuals to whom the publication is directed. " 'A

[1]As the United States Supreme Court has observed: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." (*Towne v. Eisner* (1918) 245 U.S. 418, 425 [62 L.Ed. 372, 376, 38 S.Ct. 158] quoted in *Bon Air Hotel, Inc. v. Time, Inc.* (5th Cir. 1970) 426 F.2d 858, 867, fn. 17.)

publication claimed to be defamatory must be read and construed in the sense in which the *readers to whom it is addressed* would ordinarily understand it. So the whole item . . . should be read and construed together, and its meaning and signification thus determined.' " (*Washington Post Co. v. Chaloner* (1919) 250 U.S. 290, 293 [63 L.Ed. 987, 989, 39 S.Ct. 448], italics added; accord *Hoffman v. Washington Post Co.* (D.D.C. 1977) 433 F.Supp. 600, 602, fn. 1; *Scott v. McDonnell Douglas Corp.* (1974) 37 Cal. App.3d 277, 291, fn. 11 [112 Cal.Rptr. 609]; see Eldredge, The Law of Defamation (1978) § 9, pp. 44-45.)

The events and environment which precipitate the publication must also be examined. "[W]here potentially defamatory statements are published in a public debate . . . or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." (*Gregory v. McDonnell Douglas Corp., supra,* 17 Cal.3d at p. 601; see *Letter Carriers v. Austin, supra,* 418 U.S. at pp. 284-286 [41 L.Ed.2d at pp. 761-762].)

This is particularly relevant where a heated political controversy prompts the publication. The United States Supreme Court has observed that in the midst of such political campaigns " '[c]harges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent.' " (*New York Times Co. v. Sullivan, supra,* 376 U.S. at p. 273, fn. 14 [11 L.Ed.2d at

p. 702].) As a result, courts must decide whether the challenged language constitutes a statement of fact in "light of the usual political hyperbole customarily encountered when political figures clash on controversial public matters." (*Scott v. McDonnell Douglas Corp., supra,* 37 Cal.App.3d at p. 291.)

II

Appellate courts are required to " 'make an independent examination of the whole record' " to guarantee that these principles "have been constitutionally applied." (*New York Times Co. v. Sullivan, supra,* 376 U.S. at p. 285 [11 L.Ed.2d at 709].) Consider the record. In July 1970. Morton Baum and Thomas Hogard assumed their ofrices as two of the five councilmen for the City of Seal Beach. Less than a month later, Baum and Hogard joined with incumbent Councilman Conroy Fuhrman to fire the city manager and city attorney. A citizens' group claimed this violated the city charter and promptly filed a notice of intention to circulate recall petitions against Fuhrman.

The city manager had been investigating charges of misconduct and drug abuse at a teenage dance hall operated by William Robertson. This investigation was continued by the interim city manager, who found the charges to be true and suspended the dance hall's license. Robertson appealed to the city council, and public hearings were held over a two-month period. Baum refused to disqualify himself despite his close personal relationship with Robertson. In a final 3-2 vote, Baum, Hogard and Fuhrman united to reject the city manager's findings.

Another controversy began on October 21, 1970, when the City of Seal Beach issued building permits

for the construction of an apartment complex by R & B Development Company. On October 30th, these permits were revoked because the final plans had not been fully examined and approved. On November 2d, a building moratorium in the area encompassing the development project was passed 3-2 by the city council because ". . . absolutely no investigation, study, evaluation or consideration was made or given to the possible adverse, or even catastrophic effects that the implementation of the [Redevelopment] Project Plan might have upon the quality and purity of the environment . . . ." No building permits were to be issued until environmental studies had been completed. The R & B Development Company filed suit seeking the reissuance of the building permits, an injunction against the enforcement of the moratorium, and damages.

At an executive session on November 23d, the council reversed itself and exempted the R & B Development Company from the moratorium. The building permits were immediately reissued in exchange for the development company's agreement to pay $100,000 to the city, to drop its lawsuit, and to rent to married as well as single persons. The development company made no changes in its building plans and no environmental studies were conducted. Councilman Holden, joined by Councilman Gummere, charged that the city's activities amounted to "extortion" and "blackmail." Nevertheless, a majority of the council approved the settlement that evening after its terms were discussed in a public council meeting.

In August 1970, petitions were circulated to recall Fuhrman, and 6,900 signatures were submitted, including 55 percent of the district represented by Fuhrman. Although the required number of signatures were certi-

fied by the city clerk, Baum and Hogard voted against setting a date for the recall election.[2] A mandate proceeding, initiated by the Good Government Group, was filed requesting the court to order the council to set an election.

In December 1970, a recall election was ordered by the superior court, but Baum, Hogard and Fuhrman filed an appeal. Councilman Gummere, who had consistently opposed Baum, Hogard and Fuhrman, offered to resign if the recall election were allowed to go forward. This offer was accepted, and the Fuhrman recall election was set. In January 1971, notices of intent to circulate recall petitions were filed against Hogard and Baum. Fuhrman was recalled by a 6-1 margin in March, and Hogard was recalled by two-thirds of the electorate in August.

These events were reported in the defendants' monthly newsletter. In front page articles during November and December, the newsletter detailed the "arbitrary actions," "irresponsible" conduct and "machinations" of the "combine" (Baum, Hogard and Fuhrman). A third-page article appearing in the February issue formed the basis of this action by real party in interest, Hogard.[3]

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[2]Baum, Hogard and Fuhrman also voted to retain at public expense the attorney who had represented Robertson in the dance hall hearings. He was asked to investigate the recall movement. When the city treasurer questioned the legality of this act and refused to pay the attorney's fees, Baum, Hogard and Fuhrman instituted civil suit. The superior court upheld the treasurer's action.

[3]The article is appended to the dissenting opinion by Justice Newman (*ante*, pp. 688-689).

Fuhrman filed suit based on the same article. Defendants' motion for summary judgment was granted and an appeal is pending. (*Fuhrman v. Day* (2 Civ. 50641).)

The article discussed the conduct of Hogard, Baum and Fuhrman, denominated the "combine," in their capacity as public officials. They were criticized for expending public funds to fight the Fuhrman recall effort, refusing to set a date for the recall election, and forcing another councilman to resign in exchange for setting a date for the recall election. The article deemed the "combine's" performance of their official duties "recalcitrant" and "irresponsible." Their conduct was denigrated as "daily chicanery and machinations," their actions were considered "infamy." The article concluded that "the combine will pay for its infamy and lose its stranglehold on the City" through recall elections. Readers were warned to expect to hear "a lot of political hog-wash" from the "combine" in defense of their conduct as the recall elections approached.

The paragraph containing the words found objectionable by the majority is buried in the middle of the article.[4] The subject of that paragraph was the settlement of the dispute between the city council and R & B Development Company. Specifically the article charged the "combine" with "extort[ing] by blackmail $100,000.00 from the R & B Development Company." The majority argue this court cannot conclude, as a matter of law, that this was only a colorful character-

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[4]The article's fourth paragraph states: "This is the same combine which extorted by blackmail $100,000.00 from the R & B Development Company. For its thirty pieces of silver the combine agreed to forgo its concern for the City's ecology, pollution and strain on our sanitation system that Baum had so sanctimoniously raised during his campaign and in City Council meetings. For economical reasons the R & B Development Company submitted to the 'holdup' and agreed to drop its multi-million dollar suit against the City so that it could begin the construction of apartment buildings in the downtown section of the City."

ization of the way these councilmen handled the city's business. The majority fasten on the failure to state explicitly that the development company's payment went to the city. This omission supposedly leaves the article ambiguous and creates a jury question; would an ordinary reader have understood that sentence as making the factual assertion that the councilmen had personally pocketed the money? (Maj. opn., *ante,* at pp. 681-682.)

I cannot agree that this article, which clears its ground with the subtlety of a bulldozer, is ambiguous or suggests in any way that the councilmen were guilty of the crime of blackmail. No reader of the article could miss the strident tone and hyperbole used to express the author's criticisms of the councilmen's official conduct. The article was a partisan indictment of their actions, alleging abuses of power and unprincipled conduct. The councilmen were accused of undermining "honest and responsible government," of "arrogance," of "daily chicanery and machinations," and of refusing to answer "charges of misconduct and illegal activities." Surely if the author intended to blacken their reputations by alleging the receipt of a personal payment in exchange for official favors, he would have proclaimed the outrage openly and in the first paragraph, not the fourth.

Moreover, even scant attention to the language of the offending paragraph, set in the midst of this tirade, makes abundantly clear the rhetorical nature of the blackmail charge. The paragraph labeled the $100,000 settlement a " 'holdup.' " By placing the word in quotation marks, the author clearly announced he was castigating the combine for the settlement's unfairness, not its unlawfulness.

The deliberate use of figurative language was again impressed upon the reader when the $100,000 was referred to as "thirty pieces of silver." Judas received thirty pieces of silver, not the three councilmen of Seal Beach. Finally, the paragraph concluded by noting that R & B Development Company dropped its lawsuit *against the city* as part of the settlement. This belies any suggestion that the councilmen personally pocketed the money. The statement confirms that it was the city, acting through the council, which negotiated and received the payment.

The charges made against the three councilmen are not uncommon in a vigorously contested political campaign. The readers of this newsletter had previously read critical articles about the "combine's" conduct. The electorate was aware of the intense emotions generated by the recall campaign. The dispute between the city and the development company had been discussed at length in two public council meetings and reported in the local press. The settlement was publicly memorialized in the council's minutes and in the agreements and letters between the parties. The majority concede that "[t]he fact that *the city* had received the $100,000 payment in settlement of the dispute with the developer was public knowledge." (Maj. opn., *ante,* at 681, italics added.)[5]

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[5]The majority see the article's failure to include more details of the settlement as its downfall, presumably because the reader would not understand what actually occurred without more facts. However, Hogard seemed to have little doubt about the public's awareness of the details of the dispute. In response to a notice of intent to circulate petitions to recall him just weeks before this article was published, Hogard published a list of council's "accomplishments" including their

(This footnote is continued on next page)

In such a highly political context, readers would readily "anticipate efforts by the parties to persuade [them] to their positions by the use of epithets, fiery rhetoric or hyperbole . . . ." (*Gregory v. McDonnell Douglas Corp., supra,* 17 Cal.3d at p. 601.) Reasonable readers, who persevered through the article's repeated criticisms, would easily understand that "blackmail" referred to political, not criminal, misconduct. As such, the statement clearly is an expression of opinion characterizing the conduct of a public official. Therefore, it is constitutionally protected as a matter of law.

The case law is in accord. In *Greenbelt Pub. Assn. v. Bresler, supra,* 398 U.S. 6, a small weekly newspaper was sued for libel for reporting that individuals at a public city council meeting had charged "blackmail" in connection with a developer's negotiations with the council. The articles, as in the present case, presented only the salient features of the event reported, not a verbatim transcript. Nevertheless, the United States Supreme Court held, as a matter of constitutional law, that the word "blackmail" was not defamatory when spoken at the meeting or printed in the newspaper. (*Id.,* at p. 13 [26 L.Ed.2d at pp. 14-15].) The court found that the word was "no more than rhetorical hyperbole, a vigorous epithet . . . ." (*Id.,* at p. 14 [26 L.Ed.2d at p. 15].) The language was not defamatory since a member of the audience and a reader of the paper would "have understood exactly what was meant: it was [the plaintiff's] public and wholly

successful effort to " 'persuade' " R & B Development Company, through the exercise of " 'Brinkmanship,' " to allow married couples to rent apartments in the proposed project. The "renegotiated agreement" won by the council also secured an additional $100,000 fee from the developer.

legal negotiating proposals that were being criticized." (*Ibid.*) That is equally true here.[6]

In *Gregory v. McDonnell Douglas Corp., supra,* 17 Cal.3d at page 603, this court unanimously held accusations that union officers were "willing to sacrifice the interests of the members of their union to further their own political aspirations and personal ambitions" were incapable of supporting a defamation action. Such accusations are as capable of being construed as statements of fact as the statements in the present case. However, this court held that since "the charges are of the kind typically generated in the 'economic give-and-take' of a spirited labor dispute . . .," they "constituted protected statements of opinion . . . ." (*Id.,* at pp. 603-604.)[7]

[6]The trial court in *Thuma v. Hearst Corporation* (D.Md. 1972) 340 F.Supp. 867, relied on *Greenbelt* in finding that a libel action could not be based on a press report of a father's lament that the shooting of his son by police was "cold-blooded murder." "It would seem most improbable that persons seeing the words 'cold-blooded murder,' as they were used in the context of the events reported in the articles, would interpret them as meaning premeditated murder. Whatever those words may connote in other circumstances, in this situation they were rather clearly hyperbole expressing the father's most vehement feeling that the shooting was completely unnecessary . . . . [T]heir clear import is that [the victim's] family, friends and neighbors were as angry as they could be because they considered the shooting to have been unjustified and unnecessary. It is that import which would be impressed upon a reader of the articles, and which would prevent him from thinking that the father was charging Thuma with premeditated murder. . . ." (*Id.,* at p. 871: cf. *Curtis Publishing Company v. Birdsong* (5th Cir. 1966) 360 F.2d 344.)

[7]In its discussion of the kind of statements entitled to constitutional protection, the *Gregory* court discussed with approval two Court of Appeal decisions involving comments made during political contests. In *Scott v. McDonnell Douglas Corp., supra,* 37 Cal.App.3d 277, the trial court granted a demurrer in a lawsuit based on charges by a city council-

(This footnote is continued on next page)

Similarly, it has been held that charging a person with the kind of "paranoid thinking that you get from a schizophrenic" was "not capable of a defamatory meaning." (*Fram v. Yellow Cab Company of Pittsburgh* (W.D.Pa. 1975) 380 F.Supp. 1314, 1323, 1330.) The court noted that in the context of a television talk show the audience was accustomed to hearing criticism

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man "that a city manager would '"stoop to any form of action in . . . [his] power to . . . stay in offfice,"' that in a letter released to the press he '"assume[d] the position of . . . City Dictator,"' that his administration of the city's affairs had descended to a '"mutinous character,"' and that the people of Santa Monica are not so fortunate as to have '". . . a City Manager who is dedicated to efficiently and honestly administer the affairs of the City for the people and through the people's elected representatives. . . ."'" (*Gregory v. McDonnell Douglas Corp., supra,* 17 Cal.3d at p. 602.) In affirming the trial court's action, the Court of Appeal stated: "The fact that plaintiff take umbrage at the tone and level of criticism directed against him is not sufficient to sustain an action for defamation. The statements in the instant controversy should be considered in light of the usual political hyperbole customarily encountered when political figures clash on controversial public matters. An individual in this country has the right to severely criticize the performance of public officials." (*Scott v. McDonnell Douglas Corp., supra,* 37 Cal. App.3d at p. 291.)

In the second case, *Taylor v. Lewis* (1933) 132 Cal.App. 381 [22 P.2d 569], the Court of Appeal affirmed the sustaining of a demurrer in a defamation action based on criticisms of a councilman in the midst of a recall proceeding. "[T]he court found as opinion rather than fact statements that certain councilmen '"did not consistently serve the best interest of the city,"' '"usurped the functions of the city manager, dictated appointments in violation of the charter, and forced out of office useful employees of the city,"' '"had as little respect for sound business usage in their conduct of city affairs as they showed for the character and the merit system in municipal service,"' did not always '"take the highest and best bids when selling, and the lowest and best when buying,"' and '"lacked that conscientious regard for the city's interest which makes of public office a public trust"; . . .'" (*Gregory v. McDonnell Douglas Corp., supra,* 17 Cal.3d at pp. 602-603.) Surely these allegations of misfeasance is public office are no less susceptible to construction as statements of fact than the expressions in the present case.

and controversy, and would understand the comment as colorful rebuttal rather than an accusation of mental illness. (*Id.,* at pp. 1329-1331.)[8]

Another recent case held that a broadcast was not defamatory despite the omission of an important statement of fact. The broadcast, entitled "Public Bridges & Private Riches," created the impression that a former member and chairman of the Delaware River Port Authority privately benefitted from inside information, failed to reveal conflicts of interest, and abused his public trust. (*Pierce v. Capital Cities Communications, Inc.* (3d Cir. 1978) 576 F.2d 495.) The broadcast stated that "'some Port Authority Commissioners saw an opportunity for enormous profits, profits on land deals . . . .'" (*Id.,* at p. 498.) Land purchases involving plaintiff, who appeared to benefit from the authority's decisions, were described in detail. In describing one transaction, the defendant omitted the date of the plaintiff's purchase, creating the impression that the plaintiff benefitted from inside information. In fact, the land was purchased after the authority's action was public knowledge. Despite the fact that *the failure to include this statement of fact* led to the impression of misconduct and unlawful dealings in office, the court

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[8]There is an analogous case from this state. In *Yorty v. Chandler* (1970) 13 Cal.App.3d 467, 472-473 [91 Cal.Rptr. 709], defendant published a cartoon suggesting plaintiff was "unqualified for high national office" and that plaintiff's contrary view "was so far removed from reality . . . that [his] ambitions could popularly be described as insane, mad, or crazy." Nevertheless, the court found no reasonable person would construe the cartoon other than as an expression of opinion, i.e., the cartoon was "not reasonably susceptible to a defamatory meaning." (*Id.,* at p. 477.) "[M]ere expression of opinion or severe criticism is not libelous, even though it adversely reflects on the fitness of an individual for public office." (*Id.,* at pp. 472-473.) The sustaining of a demurrer was affirmed.

held that the broadcast was "incapable of a defamatory meaning." (*Id.*, at p. 510; cf. *Time v. Pape* (1971) 401 U.S. 279, 289-290 [28 L.Ed.2d 45, 52-54, 91 S.Ct. 633].)

The reasoning of these decisions is compelling. The comments were made in the middle of a public controversy, where caustic language, exaggeration and fiery rhetoric are regularly employed. In this context, many comments which might be construed as assertions of fact in a more tranquil setting are found, as a matter of law, to be opinions intended to persuade. The First Amendment protects such statements from judicial incursions. "Any other conclusion would have 'disquieting implications for criticism of governmental conduct,' for it would likely lead to the kind of chilling effect on the media that *New York Times* and its successors directly seek to avoid." (*Pierce v. Capital Cities Communications, Inc., supra,* 576 F.2d at p. 510, fns. omitted.)[9]

III

The majority's reason for affirming the denial of defendants' motion for summary judgment portends a judicial intervention in the area of our free press which is inimical to the principles enshrined in the First Amendment. In holding that a defamation suit will lie because of the alleged failure to make one statement sufficiently explicit, the majority set a course which bodes ill for the future. Their analysis would make editors of judges. The judiciary's red pen is

[9]"To deny to the press the right to use hyperbole, under the threat of removing the protective mantle of *New York Times,* would condemn the press to an arid, desiccated recital of bare facts." (*Time, Inc. v. Johnston* (4th Cir. 1971) 448 F.2d 378, 384.)

thereby unleashed to strike vexatious language or to demand augmentation according to the judges' image of how the public should be informed.

This will cause publishers to moderate their political commentary and to dilute the intensity of their judgments in order to avoid the shadow of liability cast by this court's opinion. As a consequence, the vigorous and vital public debate essential to a healthy electoral process will be tempered to polite sparring. Today, "good government" is made a double victim.

APPENDIX B.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Dec. 27, 1978
I have this day filed Order REHEARING DENIED.

In re: L.A. No. 30839, Good Government Group of Seal Beach vs. Superior Court, Los Angeles.

Respectfully,

G. E. Bishel
Clerk

Supreme Court, U. S.
FILED
APR 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-1481

GOOD GOVERNMENT GROUP OF SEAL BEACH, INC., et al.,

Petitioners,

-vs-

THOMAS R. HOGARD,

Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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GOOD GOVERNMENT GROUP OF SEAL BEACH, INC., et al.,

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-vs-

THOMAS R. HOGARD,

Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

Petitioners, defendants in the lower Court, present as the theme for their Petition for Writ of Certiorari, their contention that the libel action of the respondent, plaintiff below, was based solely upon the petitioners' use of the term "extorted by blackmail" in a publication authored and distributed by petitioners in 1971.

That contention finds no support in the pleadings filed or in the proceedings undertaken in the State Court. Rather, the contrary is true.

It is petitioners, not respondents, who seek to isolate that phrase from the article as a whole. Petitioners' brief does not even set forth the subject article in its entirety. Instead, they designate as the "allegedly libelous article", the text contained in the Appendix to Justice Newman's dissent to the California Supreme Court opinion of this case, without noticing that such Appendix sets forth the first five paragraphs of the article, but omits the sixth and final paragraph. A copy of that sixth paragraph is contained in the Appendix to this brief, at pages A-1 and A-2. The language of that paragraph is relevant and necessary to a determination of the defamatory character of the article, and will be further discussed as part of respondent's argument, hereinafter set forth.

REPLY TO QUESTIONS PRESENTED

Petitioners' brief suggests three basic questions for the Court's consideration. Their questions, as presented, contain much of their arguments, and assumes the unwarranted premise previously discussed. Respondent would rephrase those issues as follows:

First, petitioners ask this Court to review the California Supreme Court's interpretation of

the language of the subject article. They contend that their publication contains mere expressions of opinion and political hyperbole. Respondent has insisted, and still insists, that the language of the article is an unequivocal false charge of specific criminal activity and misconduct in public office. The California Supreme Court found a middle ground, determining the language used to be ambiguous.

Second, petitioners ask this Court to determine whether or not, in a libel action to which the New York Times privilege applies, on a motion for summary judgment, the trial judge must resolve any ambiguity that may exist in the language of the publication at issue and determine, as a matter of law, whether the words complained of were expressions of opinion or actionable statements of fact.

Third, petitioners ask this Court to define the role of the summary judgment remedy in a political libel case, and, within that procedure, review the plaintiff's burden of proof with respect to the issue of "actual malice".

REPLY TO STATEMENT OF THE CASE

Petitioners' conclusions as to the facts and circumstances attending the publication of their

defamatory article do not accurately depict those events. They piously assert that the Good Government Group of Seal Beach was a homeowners' association "committed to cleaning up the city government of Seal Beach". In actuality, it was an organization of Thomas E. Blackman, Frank B. Sales, Ed Smith (now deceased) and others, to seize control of the government of the City of Seal Beach. And indeed, these same individuals did succeed to the City Council of the City of Seal Beach after respondent's recall, and became a majority of that Council, to dominate that City's government for many years.

Respondent's former attorney, Richard Bledsoe, did file identical lawsuits for respondent (this case) and Conway Fuhrman, and did, at one time or another, represent William Robertson. But, other than as stated, the "undisputed facts" before the California Superior Court were not precisely as defined by petitioners. The termination of the City Manager and City Attorney of the City of Seal Beach were proper and legal functions of the City Council, and not the result of any "secret meeting" in violation of the City's Charter. And the reinstatement of the dance hall license of William Robertson did not involve any impropriety on the part of respondent nor generate public sentiment against him, as

petitioners would infer. Rather, the charges of illicit drugs and misconduct at the dance hall premises were never substantiated, and, after extensive public hearings, the City Council had no alternative but to reinstate the dance hall license or face protracted litigation because of its unwarranted suspension.

But it is the controversy involving the R & B Development Company, more germane to the libel of this case, that petitioners most significantly distort. In October, 1970, the City Manager and City Attorney of the City of Seal Beach, not respondent and others, withdrew the permits for the construction of the "swinging singles" apartment building complex proposed by the R & B Development Company. Thereafter, respondent, with two other councilmen, a majority of the five-man City Council, voted to impose a 90-day moratorium on construction within the City, to review the City Manager and City Attorney's action. In addition to the "swinging singles" concept, the City Council was concerned with the impact of the proposed complex on the already overburdened sewage disposal system of the City of Seal Beach.

Thereafter, the Development Company sued the City, but almost immediately offered to compromise its dispute by agreeing to abandon

the "swinging singles" concept of its proposed apartment building complex, and by paying an environmental impact tax of $100,000 to the City to provide for the enlargement and improvement of the City sewage disposal system that would be affected by their proposed construction. This offer was accepted by the City Manager, the City Attorney, the City's Redevelopment Agency, and by unanimous vote of the entire City Council, not by any "combine" of respondent and others, as suggested by petitioners' brief.

It is ironic that two of the defendants of this case, now petitioning this Court for Writ of Certiorari, held office as City Councilmen after respondent's recall, and graciously presided over the collection of the environmental impact tax that they now say was "part of a gouge". They took no steps to repeal, revoke, or disclaim the City Ordinance authorizing that tax, most of which was paid during their tenure as City Councilmen.

Petitioners review the matters concerning the petitions circulated to recall Councilman Fuhrman, but do not discuss the basis of the objections to those petitions nor the legal questions raised by the court proceedings brought to resolve those objections. Signatures were obtained from citizens of Seal Beach residing

outside of Fuhrman's councilmanic district, and the validity of those signatures presented a legitimate legal question for judicial determination.

Petitioners conclude their Statement of the Case by reference to segments of the publication here at issue. They first inaccurately designate Councilmen Hogard (respondent), Baum and Fuhrman as the "combine" named in the article. But the article designates "Robertson-Baum-Fuhrman-Hogard" as the "combine". Petitioners thus fabricated a conspiracy of respondent and other councilmen with a somewhat controversial, if not notorious, resident of Seal Beach. That stratagem is, of itself, evidence of petitioners' intent to demean and defame the respondent by their article.

ARGUMENT AND OPPOSITION TO PETITIONERS' REASONS FOR GRANTING THE WRIT

Within this section respondent will discuss the several subdivisions of petitioners' Argument by similar headings.

I

SUMMARY JUDGMENT NOT APPROPRIATE TO LIBEL BASED UPON ARTICLE THAT CHARGES CRIMINAL ACTIVITY AND MISCONDUCT IN OFFICE.

A. Role of the Summary Judgment Procedure in Libel Cases Subject to the New York Times

privilege.

This Court, in New York Times v. Sullivan, (1964) 376 U.S. 254; 11 L.Ed.2d 686, expressed its concern for the inhibiting effects of a civil libel suit on the exercise of free speech and a free press. There, this Court established a qualified privilege for the media, and apparantly everybody, where the subject of a defamatory passage was a public official. That privilege was later extended to publications concerning a public figure (Curtis Publishing Co. v. Butts (1967) 388 U.S. 130). The New York Times privilege limits recovery to the libel case where the defendant acts with knowledge of falsity or reckless disregard for truth.

The thrust of this doctrine has lead some lower courts to impose special rules for summary judgment proceedings on the political libel case. Such courts have neglected to consider the delicate balance drawn by this Court, in its limited curtailment of an individual's right to his reputation and the peaceful pursuit of his chosen calling, in favor of the greater public right to free speech and a free press. There may, of necessity, be instances where the former must yield to the latter, even though the results for a particular individual may be harsh and unfair. But nowhere, in New York Times, has this Court suggested that a public official's right to the

due process of law must be curtailed to permit one who publishes a lie a special use of the summary judgment remedy, to avoid responsibility for his act.

The conflict of decisions with respect to the summary judgment procedure in the political libel case begins with the Honorable Justice Wright's concurring opinion in the case of Wasserman v. Time, Inc., (D.D.C. 1970) 424 F.2d 920, to the effect that the trial court in a political libel case, on a pre-judgment motion, should critically weigh the evidence before it to determine the existence or absence of actual malice. At least one circuit court case has followed Justice Wright's theory (Bon Air Hotel, Inc. v. Time, Inc. (1970) 5th Circ., 426 F.2d 858). In Guam Federation of Teachers v. Ysrael (1974) 492 F.2d 438, the 9th Circuit Court has unequivocally repudiated Justice Wright's thesis:

> "However, with respect, we are not persuaded by the second phase of Judge Wright's analysis in Wasserman which suggests that, in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence. We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed

verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of facts."

The Court, in Guam, supra, further declared:

"The standard against which the evidence (in a summary judgment procedure) must be examined is that of New York Times and its progeny. But the manner in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury."

Thus, it is clear that the procedure for Summary Judgment motions, at least in the 9th Circuit, is in line with the accepted and recognized procedures designated by California Code of Civil Procedure, Section 437(c) and cases interpreting that Section (See Varco-Pruden, Inc. v. Hampshire Const. Co. (1975) 50 Cal. App.3d 654 and Keene v. Wiggins (1977) 138 Cal.Rptr. 3; 69 C.A.3d 308).

This lawsuit vividly demonstrates the impediment to the pursuit of truth and the assertation of a just cause from an abuse of the summary judgment proceeding. Although this case has survived the summary judgment process, the cost, expense

effort and delay of such proceedings have exhausted the physical, emotional and financial resources of respondent. This case has been to the California Supreme Court twice and is now the subject of petitioners' Writ of Certiorari to this Court. More than two years have elapsed since petitioners brought their motions for summary judgment, on the eve of trial. The papers and proceedings filed by petitioners in support of their motions for summary judgment and to review its denial could be measured in pounds rather than pages. Petitioners' protracted and unwarranted dilatory tactics have punished respondent beyond measure, unfairly and without justification.

B. Review of Defamatory Language of this Action.

Within their first argument petitioners again insist that respondent is concerned with but a single phrase or paragraph of the article in question. While it is true that the thrust of the libel of this case is found in the fourth paragraph of that publication, a view of that language, in context, and a study of the article in its entirety, clearly defines the unequivocal nature of the actionable defamation of this case. As previously noted, petitioners first fabricate a union of respondent and other councilmen with one William Robertson, a controversial figure in

the community of petitioners' publication. Generally demeaning references to the respondent continue throughout the article.

The document states in substance that respondent (as a member of the "combine"), continues to deny the citizens their rights, has harassed, maligned and impugned the motives of the fourth Councilman, and has needlessly expended $14,000.00 of the taxpayers' money. In the fourth paragraph, respondent is charged with a specific crime, extortion by blackmail, of a specific amount, $100,000, from a designated entity, the R & B Development Company. The article then states that "For its thirty pieces of silver (synonymous everywhere with money received for betrayal; this was the payment to Judas Iscariot for his betrayal of Jesus), the combine agreed to forego its concern for the City's ecology, pollution and strain on its sanitary system ...".

The next paragraph further discloses the petitioners' intention to defame. It refers to the "combine" (now designated as respondent, Fuhrman and Baum) as "running scared", and states that they were "given an opportunity . . . to answer specific charges of misconduct and illegal activity...", but elected not to do so.

The last paragraph is further demeaning of the respondent, although it singles out Robertson,

one of the so-called "combine", for specific attack. There, a not-so-subtle inference of criminal activity is impugned to Robertson. That paragraph suggests that an investigation of Robertson has been undertaken by the District Attorney's office and further makes obscure reference to a telephone conversation between Robertson and one Gummere, implying misconduct and compromising statements by Robertson.

C. Greenbelt v. Bresler Distinguished.

Petitioners next argue Greenbelt v. Bresler, (1970) 398 U.S. 6, 26 L.Ed.2d 6, and cite that case for the proposition that the term "blackmail" is not libel as a matter of constitutional law. But Greenbelt does not so hold. In that case, the plaintiff was attempting to obtain zoning on his property from the City, while the City sought to purchase other land that he owned. Mr. Bresler then refused to agree on a price for the property sought by the City, until he obtained the zoning he sought on his other realty. This was labeled "blackmail" by several of the defendants, and reported in the Greenbelt News Review, the title defendant. Plaintiff there brought his suit for defamation and was denied recovery by this Court decision. Petitioners correctly cited part of the Greenbelt decision, but omitted the following:

"If the reports had been truncated or distorted in such a way as to extract the word "blackmail" from the context in which it was used at the public meetings, this would be a different case. But the reports were accurate and full . . . Bresler's proposal was accurately and fully described in each article, along with the accurate statement that some people at the meetings had referred to the proposal as blackmail, and others had indicated they thought Bresler's position not unreasonable. . ."

This language makes it clear that Greenbelt v. Bresler and the case at bar are totally inconsistent. In Greenbelt, the reports were accurate and full; all of the plaintiff's activities were stated and the reader of the article would know, by the time he reached the word "blackmail", that this term was in reference to the plaintiff's bargaining for price on one parcel of land in exchange for re-zoning of another parcel, that which he had a legitimate and legal right to do, and that his conduct was not illegal in any sense of the word.

In the case at bar, the article does not mention that the $100,000 "extorted by blackmail" was the amount of an environment impact tax paid to the City of Seal Beach. The conflict between the R & B Development Company and the City of

Seal Beach was not even discussed. The "combine" is the only recipient of the $100,000 suggested by the article. In short, none of the true facts concerning the $100,000 are documented by the article, only the clear and unequivocal charge of misconduct in office and criminal activity.

II

SUMMARY JUDGMENT INAPPROPRIATE PROCEDURE FOR DETERMINATION OF AMBIGUOUS LANGUAGE IN A POLITICAL LIBEL CASE.

As previously argued, respondent views the language of the article as unequivocal statements of fact, impugning to respondent criminal activity and misconduct in office. Petitioners could not more succinctly contend that respondent, with others, extorted $100,000 by blackmail from the R & B Development Company, for their own use. But assuming, au arguendo, that the language involved was ambiguous. The California Supreme Court has held in such cases that the determination of its defamatory nature or meaning must be made by a jury or trier of facts rather than a trial judge determining a motion for summary judgment.

Petitioners reject that holding and argue in effect that some ambiguity exists in every instance involving charges against a public official,

They would relegate the resolution of any ambiguity to the court in a summary judgment proceeding because "summary judgment is a 'favored remedy' in political libel cases", and that such "threshold determination" is necessary to prevent "expensive litigation over a meritless case". But such arguments ignore the providence of the summary judgment remedy on the one hand, and the factors involved in the interpretation of the language of a political libel case on the other.

As to the first contention, respondents have previously argued that the summary judgment procedure is not, and should not be, a "favored remedy" in a case involving the New York Times privilege. As to the second contention, consideration must be given to the factors involved in the determination of whether or not particular language constitutes statements of fact or expressions of opinion. Such factors go beyond the technical and sterile scrutiny of a particular word or phrase. The many variables involved in that determination is underscored by the dissenting opinions in this case. Five out of seven justices weighing all of the facts suggested by the moving and opposing papers before the court on the summary judgment motions, made a determination that the words and phrases were ambiguous. The other two determined otherwise.

Resolution of ambiguous language of an article claimed to be defamatory necessarily extends to its meaning as understood by the reader perusing the publication. That consideration is more relevant to the determination of the libelous character of an article than any scholarly or literary interpretation of the language used. California has long followed that well recognized premise. In McLeod v. Tribune Pub. Co. (1959), 52 C.2d 536, our Supreme Court pursued that principle in the context of a libel action undertaken pursuant to the laws of California:

> "The publication is to be measured not so much by its effect when subjected to the critical analysis of the mind trained in the law, but by the natural and probable effect upon the mind of the average reader (at pg 547)."

And in Williams v. Daily Review (1965) 236 C. A.2d. 405 at 410, language was held to be libelous on its face, even though susceptible of an innocent meaning.

From the foregoing, it is apparent that the interpretation of ambiguous language in a libel action becomes a question of fact to be determined by the trier of facts, not by the Court in a summary judgment proceeding. The California Supreme Court has held, by its Opinion at issue, that the language of the article published by

petitioners was ambiguous, and has applied to this political libel case the established principle that, as to such language, it is for a jury to determine whether or not an innocent or defamatory meaning would have been given to the publication by the average reader of the article (McLeod v. Tribune Publishing, supra).

III

SUMMARY JUDGMENT BURDEN OF PLAINTIFF TO SHOW ACTUAL MALICE IN A POLITICAL LIBEL CASE

A. Rule of the Political Libel Case.

Petitioners next discuss the burden of plaintiff to show actual malice in a case within the New York Times privilege, in order to survive a motion for summary judgment. Some Federal and State Courts have required the plaintiff to show this element of such case at the summary judgment level by "clear and convincing evidence". No precise definition of that term, or guidelines for its application, have surfaced to date. A literal and strict interpretation of such a rule would preclude a plaintiff in a political libel case from recovery in virtually every instance.

The resolution of the issue of actual malice becomes a question of the defendants' subjective state of mind, and is rarely the subject of direct evidence or culpable admission. One who would practice the deliberate lie would not be likely

to admit his knowledge of falsity or reveal facts that impugn to him a reckless disregard for truth. As one Federal Circuit Court has stated:

> "In deciding whether a genuine issue of fact is raised in any case (to deny Summary Judgment), a number of general considerations are relevant. First, the right to trial by jury is at stake, so courts must be ever careful to grant summary judgment only when no issue of fact is controverted or turns upon a choice between permissible inferences from undisputed evidence ... This need for care has given rise to the valid generalizations that summary judgment must be denied when there is "doubt" whether an issue of fact has been raised, and that summary judgment is not usually appropriate when the issue raised concerns a subjective state of mind."
>
> Washington Post v. Keogh, 365 F.2d 965, 967

Rather than require a plaintiff to prove this element of his case at the summary judgment level by the strict standard suggested, respondent asks this Court to delegate this issue to the trier of facts, except in those instances where there remains no possible issue for resolution,

within the generally accepted standard of the summary judgment procedure. When dealing with an individual's intentions and his motives, many factors must be weighed. Not only is the testimony of a defendant vital to the determination of his "actual malice", but his credibility as well, including the manner in which he testifies, his demeanor while testifying, his prior statements consistent or inconsistent with his testimony in Court, and his attitude toward his giving of testimony (California's Book of Approved Jury Instructions, #2.20). Such factors can rarily, if ever, be perceived from sterile affidavits and excerpts from depositions presented to the Court in a summary judgment proceeding.

B. Consideration of Nature of Language.

The plaintiff's burden of proof on the issue of actual malice in a political libel case is always affected by the nature of the language employed by the defendant. Thus, the nature and extent of such proof will vary, depending upon whether that language is (1) libelous on its face, (2) ambiguous, or (3) opinion or political hyperbole. Respondent will discuss these several alternatives in order:

1. Article Libelous on its face: If the article is clearly libelous and contains false statements of specific misconduct or illegal activity, then plaintiff's knowledge of its

falsity would suffice, not only to raise an issue as to actual malice on summary judgment proceedings, but if admitted or undisputed, to resolve that issue in the plaintiff's favor by a summary judgment. And where unequivocal charges of specific misconduct are involved, a defendant should not be permitted to avoid his responsibility for his libel by his professed ignorance of the clear meaning of his words, or his protestations of innocent motive (Montandon v. Triangle Pub. Inc., (1975) 45 Cal.App.3d 938; 120 Cal.Rptr. 186; Patton v. Royal Industries (1968) 263 C.A.2d 760).

Such was the case here. Petitioners admitted that they always knew that respondent was not guilty of extortion, did not get the $100,000, or any part of that sum, had not committed any misconduct in office, and was not a member of any "combine". They further knew that there was no investigation by the District Attorney's office, and that respondent did not forego his concern for the City's ecology, pollution and strain on the City's sanitation system.

Such falsifying of defamatory remarks or misstatement of known facts have uniformally been held sufficient to establish the defendants' actual malice in a political libel case (Davis v. Schuchat (D.C. Cir. 1975) 510 F.2d 731; Goldwater v. Ginzburg (2nd Cir. 1969), 414 F.2d 324).

2. Ambiguous Language: Where language is ambiguous, any showing of a defendant's knowledge of the false content of his article should suffice to survive the summary judgment proceeding. It should be noted that this vital issue is dependant upon the jury's determination of whether or not the ambiguous language was understood in its defamatory sense by the readers of the article. If so, the next question of the libel case, and the political libel case, is whether the author utilized the specific language in question with intent to defame, or merely misunderstood its defamatory effect. Again, such matters are particularly within the providence of the trier of facts and should not be the subject of pre-trial determination.

As stated in McLeod v. Tribune Pub. Co., supra, at pg 550:

> "It would be a reproach to the law to hold that a defendant intent on destroying the reputation of a political opponent by falsely labeling him ... (a Communist in that case) could achieve his purpose without liability by casting his defamatory language in the form of an insinuation that left room for an untintended innocent meaning."

The California Supreme Court held the language of this case to be ambiguous, and then discussed

plaintiff's burden of proof as to actual malice. They imposed a strict burden upon respondent, and declared summary judgment to be a "favored remedy" in a political libel case. But nevertheless, they found that burden to be met from the evidence of the re-publication of the defamatory article by petitioners, after a retraction of the defamatory language was made in March, 1971. Even so, there was further proof of that actual malice submitted to the trial Court and apparently not needed by the Supreme Court, therefore not mentioned in their Opinion. Reference is made to the Declaration of Beverly Casares, wherein she stated that she was a member of the Good Government Group and present when the subject article was reviewed and approved for reprinting and distribution by that body in their January 1971 meeting. She stated that at that time, members of that group were advised that the subject article was "libel and actionable", but nevertheless authorized its printing and distribution.

3. Opinion or Political Hyperbole: If the language of the article is mere opinion or political hyperbole, the issue of "actual malice" is not presented to the Court. However, respondent does not concede that opinion can never be the subject of a libel action. While there can be no such thing as a false opinion, the defamation case is not limited always to specific charges of

misconduct. The Restatement of Torts, Section 556, carries this tort to epithets or descriptive words or opinions which carry with them the implication of acts of misconduct (See also Prosser on Torts, at pg 740).

Respondent would submit that the foregoing applies to a political libel case, where the opinion pertains to specific conduct, or was fabricated with the intent to defame.

CONCLUSION

This Court, in New York Times v. Sullivan, supra, established a qualified privilege to defame a public official. The privilege is subject to the publisher's knowledge, and fails where the publication is made with knowledge of its falsity or a reckless disregard for truth. But the privilege was meant to apply only to the innocent or negligent misstatement of fact, not to the deliberate lie. As this Court stated in Gertz v. Welch (1974) 418 U.S. 323:

> "There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interests in 'uninhibited, robust and wide-open' debate on public issues."

The creation of a privilege creates always a

concurrent power, and all power carries with it responsibility and potential abuse. Since New York Times v. Sullivan, supra, a myriad of cases expanding, limiting and defining that privilege, have struggled with the abuse of its concurrent power. One such abuse focuses on the summary judgment procedure, where the culpable defendant may find shelter for his deliberate act by the imposition of an unconscionable burden of proof on the plaintiff. Such abuse becomes a denial of the victim's right to the due process of law.

Petitioners extoll the plight of a person who defames, faced with the rigors of a civil lawsuit. Respondent asks this Court to consider also, the plight of the person defamed, subjected to the rigors of a defendants' dilatory tactics, and the special burden placed upon him at the summary judgment level of a case, which will, in many cases, deny the pursuit of a just cause.

Such protection of misconduct does not further the pursuit of truth, nor enhance the virtues of free speech or a free press.

If this Court grants petitioners' Petition for a Writ of Certiorari, respondent requests the Court to review the language of this case, and hold the same to be neither ambiguous nor susceptible to an innocent meaning, but rather, charges of specific misconduct and illegal activity, and actionable defamation. Respondent further requests

this Court to define the roll of a summary judgment proceeding in a political libel case, so that such a proceeding may not be used to subvert justice.

DATED: April 25, 1979

Respectfully submitted,

JACQUE BOYLE
Attorney for Respondent

APPENDIX

APPENDIX

(The following constitutes the last paragraph of the libelous publication of this case, inadvertantly omitted from the Appendix attached to the dissent of Justice Newman to the California Supreme Court Opinion of this case.)

"On December 12, 1970, William L. Robertson of the teen-age Marina Palace Dance Hall tried unsuccessfully to woo and subvert "Pop" Gummere. He arranged a surreptitious meeting with Mr. Gummere where he unfolded an astonishing proposition. He guaranteed that Baum would dump Fuhrman if Mr. Gummere would call off the recall of Fuhrman and thereafter Baum would join Gummere and Holden in the issues confronting the City. He suggested to "Pop" that Mr. and Mrs. Baum, Mr. and Mrs. Gummere and of course Robertson should have dinner together to discuss the matter and work out the details. Mr. Gummere, stalling Robertson, told him that he would think about the matter and let him know his decision by 2:30 p.m. Monday, December 14th. On Sunday, December the 13th, we went to attorney Glenn Watson's office in Los Angeles, where Mr. Gummere repeated Robertson's proposition in the presence of the writer, Mr. Keeler and Mr. and Mrs. Frank Sales. On Monday afternoon Mr. Gummere, in the presence

of the writer and an investigator of the District Attorney's office, repeated Robertson's conversation to Assistant District Attorney Michael Capizzi. Upon our return to Seal Beach Mr. Gummere telephoned his wife from the writer's house and learned that Robertson had called there earlier to ask where Mr. Gummere was. Robertson left with Mrs. Gummere his unlisted telephone number in case Mr. Gummere had lost it. Mr. Gummere then telephoned Robertson and I listened in on an extension. Both Mr. Gummere and myself are prepared to execute affidavits as to what was said and by whom in that telephone conversation at the proper time."

(The article is contained in Exhibit "A" of plaintiff's Second Amended Complaint, and is attached to the Declaration of Thomas I. McKnew, as part of Petitioners' moving papers for Summary Judgment.)

-PROOF OF SERVICE BY MAIL-

JACQUE BOYLE, declares and states:

That I am a member of the Bar of the Supreme Court of the United States. That I am not a party to the within action and my business address is 707 Wilshire Blvd., #4670, Los Angeles, CA. 90017. On April 26, 1979, I served the within Respondent's Brief in Opposition to Petition for a Writ of Certiorari on all parties involved in said action, by placing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Richards, Watson, Dreyfuss & Gershon
Mitchell E. Abbott
333 South Hope Street, 38th Floor
Los Angeles, California 90071

and one copy each, to:

Honorable Charles S. Vogel, Judge
Superior Court, Los Angeles County
111 North Hill Street
Los Angeles, California 90012

Clerk of the Court of Appeals of the
State of California, 2nd Appellate Dist.
3580 Wilshire Blvd., Room 301
Los Angeles, California 90010

Clerk of the Supreme Court of the
State of California
4250 State Building
San Francisco, California 94102

I declare under penalty of perjury, that the foregoing is true and correct. Executed April 26, 1979 at Los Angeles, California.

Jacque Boyle
JACQUE BOYLE, Declarant
Attorney for Respondent